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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 9 of the Rivers and Harbors Act of 1899, which requires specific congressional consent for the construction of "any . . . dike . . . over or in any . . . navigable water of the United States," applies to the construction of a dike for the disposal of dredgings in the waters of Chesapeake Bay?

2. Whether speculation concerning legislative intent and evidence of sporadic administrative actions can expand the jurisdiction of the Corps of Engineers to authorize obstructions to navigation beyond the clear limitations of Section 9 of the Rivers and Harbors Act of 1899?

PARTIES TO THE PROCEEDING BELOW

The plaintiffs below were Hart and Miller Islands Area Environmental Group, Inc., a Maryland corporation; The Honorable Clarence Long, M.C.; The Honorable Norman R. Stone, a member of the Senate of Maryland; Maryland Wildlife Federation, Inc., a Maryland corporation; John Henderson; Howard Sappington (now deceased); George Wohlleben; Robert Scott; Margaret Caldwell; and Charles Justice.

The defendants were the United States Army Corps of Engineers; The Honorable Clifford L. Alexander, Secretary of the Army; Lt. Gen. John W. Morris, Chief of Engineers of the United States Army; and Col. G. K. Withers, District Engineer, Baltimore District, United States Army Corps of Engineers.

Intervening defendants were the State of Maryland, ex rel., Stephen H. Sachs, Attorney General; and the Steamship Trade Association of Baltimore, Inc., a Maryland corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1) is not yet reported. The opinion of the District Court (App. 23) is reported at 459 F. Supp. 279. The supplementary opinion of the District Court denying reconsideration (App. 47) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 28, 1980. No petition for rehearing was filed. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. § 401 (hereinafter the "Act"), provides in pertinent part:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any . . . navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army . . . ."

Section 10 of the Act, 33 U.S.C. § 403, provides in pertinent part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

The full text of these sections, together with the text of certain relevant predecessor statutes, appears in the Appendix.

STATEMENT OF THE CASE

1. Introductory Statement

This case presents a question which this Court chose not to resolve in *Citizens Committee for the Hudson Valley*

v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied sub nomine Parker* v. *Citizens Committee for the Hudson Valley*, 400 U.S. 949 (1970) (Harlan, White and Blackmun, JJ., dissenting from denial of *certiorari*) (hereinafter referred to as *Hudson Valley*). The question concerns the respective coverage of Sections 9 and 10 of the Rivers and Harbors Act of 1899. Section 9 of that Act requires the consent of Congress and the Army Corps of Engineers ("Corps") for construction of certain types of structures in or over navigable waters of the United States which touch more than one state, including "any bridge, dam, dike or causeway over or in any" such waters. Section 10 requires only Corps of Engineers approval (delegated from the Secretary) for other, generally smaller structures in such navigable waters —wharves, piers, etc.

In *Hudson Valley* the District Court and the Court of Appeals for the Second Circuit held that the term "any . . . dike . . . over or in" navigable waters applies to all structures which meet the commonly accepted definition of "dike," rejecting arguments by the Corps for a narrower interpretation of Section 9 which would have included some but not all dikes. 302 F. Supp. 1083, 1088-89; 425 F.2d at 106. The Solicitor General of the United States and the Attorney General of the State of New York sought *certiorari* on the ground that the proper interpretation of Section 9 presented an important question worthy of this Court's consideration.[1] However, only three Justices agreed, and the Second Circuit's decision was allowed to stand. Since that time, the District Courts have reached varying conclusions upon this issue (*see* Section I, *infra*).

The instant case presents the same issue. The District Court below followed *Hudson Valley* and the plain meaning of the statute, but the Court of Appeals reversed, rejecting the *Hudson Valley* holding on the basis of novel

[1] The State of New York also sought *certiorari* on the question of plaintiffs' standing, but the Solicitor General did not.

(and we submit erroneous) readings of the legislative history and the Corps' prior administrative practices. Thus, the instant petition presents this Court with an opportunity to resolve this important federal question which has now engendered a divergence of opinion among the Circuits.

2. Factual Background

In 1970 Congress authorized dredging to deepen the Baltimore Harbor Channel to a depth of 50 feet.[2] As a condition to commencement of the dredging, the State of Maryland agreed to provide a site for disposal of the dredgings, much of which would be highly toxic. To meet this condition, the State of Maryland applied to the Army Corps of Engineers on February 23, 1972, for a permit to construct a two-square-mile diked containment area adjacent to Hart and Miller Islands in the Chesapeake Bay.[3] This structure is intended to be used for the disposal of approximately 52,000,000 cubic yards of dredged spoil. After public hearings and consideration of an environmental impact statement, the Corps issued the permit on November 22, 1976. The Corps did not seek the consent of Congress for construction of the containment area, in part because of the Corps' perception of the "political realities of the situation," which included the opposition of the local Congressman. (Court of Appeals App. 421.)

The permit, as authorized by the Secretary of the Army and issued by the Corps of Engineers, allowed the State "to construct a Diked Disposal Area to Contain Dredged Materials . . . on approximately one thousand one hundred (1,100) acres adjacent to Hart and Miller Islands." In fact, the diked disposal area would obliterate fifty percent of Miller Island and ten percent of Hart Island.

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[2] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 101, 84 Stat. 1818 (1970).

[3] Hart and Miller Islands contain beaches and wetlands, and are used primarily for recreational purposes (App. 5).

3. The Statutory Scheme

This action arises under a statutory scheme established by Congress eighty-one years ago to oversee the reasonableness of obstructions to navigation in the waters of the United States. Under the Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3, Congress has power to regulate all obstructions to navigation,[4] but Congress did not begin to exercise its authority until the 1880s.[5] In the absence of such regulation the states asserted their residual powers over commerce.[6]

In 1890 Congress enacted the first general legislation subjecting obstructions in navigable waters to federal scrutiny. Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454, prohibited the construction of wharves, piers, dolphins, booms, dams, weirs, breakwaters, bulkheads, jetties, and "structures of any kind" outside established harbor lines without permission from the Secretary of War.[7] Section 7 also permitted construction, pursuant to state legislative authority, of bridges, bridge draws, bridge piers and abutments, causeways, and "other works" over or in navigable waters of the United States, provided the plans were later approved by the Secretary of War.[8] In other words, the approval of the Secretary of War was a necessary but not sufficient requirement for construction of structures falling into this second grouping (bridges, causeways, etc.), since state approval was also required.

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[4] *See, e.g., Pound* v. *Turck*, 95 U.S. 459 (1877); *Cardwell* v. *American Bridge Co.*, 113 U.S. 205 (1885).

[5] *See, e.g.*, Rivers and Harbors Act of 1888, § 9, 25 Stat. 424-25; Rivers and Harbors Act of 1884, §§ 2, 8, 23 Stat. 133, 147, 148-49.

[6] *See, e.g., Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1887).

[7] This language is the predecessor of § 10, cl. 2 of the 1899 Act. *See infra*, p .6.

[8] This language is the predecessor of § 9 of the 1899 Act. *See infra*, p. 6.

State authorization powers were further curtailed by a proviso to Section 7 which expressly limited them to structures over or in navigable waters wholly within the limits of a state. This proviso effectively required Congressional authorization for all bridges over or in navigable waters touching more than one state. 20 Op. A.G. 488, 491-92 (1892); *see* 21 Op. A.G. 41, 43-44 (1894).

Congress modified the 1890 legislation nine years later when it passed the Act under which this litigation arises, the Rivers and Harbors Act of 1899, 30 Stat. 1121, 33 U.S.C. § 401 *et seq.* One change made by the 1899 Act directly affects proper resolution of this action. Section 7 of the 1890 Act had distinguished between one category of structures—wharves, piers, dolphins, booms, dams, and jetties—and another that included bridges, bridge draws, bridge piers and abutments, and causeways. Authority to permit construction of the former lay with the Secretary of War, whereas authority to permit construction of the latter required the concurrence of either a state legislature or Congress. The successor provisions of the 1899 Act excluded dams from the first category of structures, *see* § 10, cl. 2, and added dams and *dikes* to the second, *see* § 9. In addition, the 1899 Act also clarified the requirement of express congressional consent for construction of certain structures falling within the second category. Thus, "any dike" constructed outside a harbor and over or in a navigable waterway touching more than one state had to be authorized by Congress, rather than merely by one or more states.

Having asserted the power of federal review over all structures affecting navigation, Congress delegated away much of that authority in order to avoid overburdening itself. The Secretary of War (now the Secretary of the Army) rules on the proposed obstructions to navigation enumerated in Section 10—wharves, piers, etc.[9] *See Wis-*

[9] This authority has been redelegated to the Corps of Engineers. 33 C.F.R. § 325.8 (1977); 33 C.F.R. § 322, App. B (1977).

consin v. *Illinois*, 287 U.S. 367, 413 (1929). In addition, the states, subject to further approval by the Corps, authorize construction of bridges, dams, dikes and causeways in or over navigable waterways wholly within a state, But Congress carefully reserved to itself the authority to approve or disapprove bridges, dams, dikes, or causeways situated in or over navigable waterways touching more than one state. This statutory reservation of authority stands unmodified in any pertinent way today.[10]

4. The District Court Proceedings

On June 30, 1977, this suit was brought in the United States District Court for the District of Maryland, challenging various actions of the Corps of Engineers in connection with the Hart and Miller Islands diked disposal project.[11] The plaintiffs included, among others, a local citizens' group, U.S. Congressman Clarence Long, and State Senator Norman Stone. Both legislators represent districts which include Hart and Miller Islands. Plaintiffs opposed construction of the disposal facility in question on environmental, safety, and aesthetic grounds. They sought, *inter alia*, a declaration that the action of the Corps in issuing the permit was unlawful and void for lack of consent of Congress, as required by Section 9 of the Act.[12]

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[10] Apart from the delegations within the 1899 Act, Congress has also empowered the Coast Guard (successor to the Secretary of the Army) and the Federal Energy Regulatory Commission (successor to the Federal Power Commission) to authorize bridge and dam construction across or in navigable waterways in certain circumstances. *See* 33 U.S.C. §§ 525, 530 (General Bridge Act) and 16 U.S.C. §§ 797(e), 817 (Federal Power Act).

[11] The District Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331(a).

[12] It is undisputed that the Chesapeake Bay is a navigable body of water and that the navigable portions of the Bay do not lie wholly within one state (App. 29).

Cross-motions for summary judgment were filed, and the District Court (Murray, J.) granted summary judgment to the plaintiffs, declaring that the Corps of Engineers had exceeded its authority by issuing the permit without having obtained the consent of Congress. 459 F. Supp. 279 (D. Md. 1978) (App. 59-60). In resolving the question of the scope of Section 9, the District Court analyzed the reported case law, the history of Sections 9 and 10, and the Corps' past administrative practice with respect to the application of those provisions. It concluded that it must decide whether the proposed structure is a dike by applying the ordinary meaning of that term, thus following the Second Circuit's decision in *Hudson Valley.*

The Corps had argued that "dike" in Section 9 referred only to structures which completely span a navigable waterway, but the District Court disagreed. Aside from the fact that the commonly accepted definition of "dike" did not include such a limitation, the Court noted that Section 9 explicitly covered "any dike . . . over *or in* any . . . navigable water" (App. 44), and that the language "over or in" was precisely contrary to the Corps' interpretation. The Court also relied upon the fact that the Corps' own materials concerning this Chesapeake Bay project repeatedly referred to it as a dike (App. 39-40).

The District Court refused to defer to the Corps' alleged longstanding administrative interpretation of "dikes" as structures which span waterways. It pointed out that such a definition was at odds with the statutory language and noted that such self-serving statements could not extend, in "bootstrap" fashion, the Corps' statutorily confined jurisdiction. (App. 43; *see also* App. 48-49 (on rehearing)). Finally, the Court rejected the Corps' contention that Congress had tacitly ratified the agency's interpretation by various pieces of recent legislation, finding no basis for such a claim. In fact, the Court pointed out that Congress had recently specifically exempted certain proposed diked

disposal areas in the Great Lakes from the application of Section 9 by the very legislation which authorized the Baltimore harbor dredging. *See* Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 123, 84 Stat. 1818, 1823 (1970). The District Court concluded from that evidence that Congress understood Section 9 to apply to dikes which do not completely span a waterway and that Congressional consent is required for their construction unless they are explicitly exempted by statute, as were the Great Lakes facilities.

Having so interpreted Section 9, the District Court ruled that the structure was a dike, concluded that the Corps had exceeded its jurisdiction, and held that the permit was of no force without the approval of Congress. Judgment was entered for plaintiffs.

Defendants and intervenors moved for rehearing by the District Court, relying principally upon the Corps' administrative interpretation of Section 9. After careful consideration, the District Court denied the motion by written opinion of November 22, 1978 (App. 47). The Court noted again that the Corps' interpretation was inconsistent with the plain language of the statute, and that deference to that interpretation would permit the Corps to obtain for itself authority which Congress had chosen not to give it (App. 52).

5. The Court of Appeals Proceedings

All defendants and intervenors timely appealed to the United States Court of Appeals for the Fourth Circuit.[13] While the matter was pending on appeal, congressional approval for the project was sought, but could not be obtained.

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[13] The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

On May 28, 1980, the Court of Appeals (Widener and Hall, JJ., and Warriner, D.J.) reversed, finding that Section 9 of the Act did not apply to the project in question. The Court adopted the Corps' contention that Section 9 applied only to dikes which entirely traverse a navigable body of water.

Unlike the District Court, the Court of Appeals did not apply the plain meaning of the term "dike," because it found that Section 9 of the Act was ambiguous (App. 7, 11). It drew that conclusion from this Court's statement in *Wisconsin* v. *Illinois, supra,* 287 U.S. at 413, that the interrelationship of various segments of Section 10 of the Act was somewhat ambiguous. The Court of Appeals suggested that such ambiguity "probably" applied to Section 9 as well.

Given this supposed ambiguity in statutory language, the Court of Appeals then focused upon a variety of materials which the Corps tendered and characterized as legislative history and administrative practice. After demonstrating the derivation of the 1899 Act from the 1890 Act, the Court focused on the changes, noted above. It accepted without question and without documentation the Corps' assertion that the congressional consent requirement of Section 9 "may well have been intended" to overcome broad *dicta* in *United States* v. *Keokuk & H. Bridge Co.,* 45 F. 178 (S.D. Iowa 1890), and *United States* v. *Rider,* 50 F. 406 (S.D. Ohio 1891), to the effect that Congress could not constitutionally delegate its authority to determine when and where bridges should be built over the navigable waters of the country (App. 15). This undisclosed purpose was viewed by the Fourth Circuit as a better guide to the meaning of the statutory changes than the language employed by Congress.

The Fourth Circuit also examined miscellaneous evidence proffered by the Corps concerning its administrative practice—a 1926 Corps lecture, the Secretary of War's con-

gressional testimony in 1916, and two affidavits from Corps employees. However, apparently recognizing the sporadic and self-serving nature of the Corps' declarations in favor of its own authority, the Court also suggested that Congress was aware of and had approved the Corps' practices during hearings on the Federal Water Pollution Control Act Amendments of 1972.[14]

In sum, the Court accepted the Corps' proposed interpretation of Section 9, finding it to be "perfectly reasonable" (App. 15), and "clear, convenient, and workable" (App. 20).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With A Decision Of The Second Circuit, And This Court Should Resolve This Conflict On An Important Question Of Federal Law

In *Citizens Committee for the Hudson Valley* v. *Volpe, supra,* 425 F.2d 97, the Second Circuit held invalid a permit granted by the Secretary of the Army for the construction of a four-and-one-half-mile-long dike adjacent and parallel to the eastern shore of the Hudson River. The Court held that the structure in question was a "dike" within the meaning of Section 9 of the Rivers and Harbors Act of 1899, and therefore could not be built without congressional approval.

In *Hudson Valley,* the District Court and the Court of Appeals, after "carefully review[ing] the pertinent evidence and consider[ing] the governing rules of statutory construction," and after consulting technical dictionary definitions included in the record, rejected the Govern-

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[14] In fact, as noted above and as found by the District Court, Congress' actions in specifically exempting certain diked disposal projects in the Great Lakes from the scope of Section 9 suggest precisely the opposite—that Section 9 applies to such dike projects absent an express exemption.

ment's position that not all dikes are governed by Section 9. 302 F. Supp. at 1088-89; 425 F.2d at 106. The District Court and the Second Circuit applied the basic principle of statutory interpretation that statutes should be interpreted according to their plain meaning or common significance.[15] In addition, the Court found no legislative or judicial authority to support the Corps' contrary position. 302 F. Supp. at 1089.

The United States and the State of New York petitioned for *certiorari* to review the Second Circuit's decision, but review was denied, Justices Harlan, White and Blackmun dissenting. 400 U.S. 949 (1970).

In this case, the Fourth Circuit adopted an entirely different approach and reached the opposite result. Unlike the Second Circuit, which relied on the plain meaning of "any dike," the Fourth Circuit found that term ambiguous. As noted above, the Fourth Circuit then proceeded to find meaning in various legislative and administrative materials, and to conclude from them that "any dike" really means "some dikes," precisely the conclusion rejected by the Second Circuit.

The direct conflict between the Circuits is easily illustrated by the fact that if the instant case were decided under the principles of *Hudson Valley* (as it was in the District Court), plaintiffs would prevail, since the structure in question is concededly within the commonly accepted meaning of a dike and is consistently described by the Corps as a dike in the materials underlying the permit. Conversely, the *Hudson Valley* case would undoubtedly have come to the opposite result if decided under the principles set out by the Fourth Circuit herein, since the dike at issue there did not span the Hudson River.

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[15] This principle has recently been reaffirmed in *Maine* v. *Thiboutot*, —— U.S. —— (1980), No. 79-838, slip op. 3, 48 U.S.L.W. 4859 (June 25, 1980), and *S.E.C.* v. *Sloan*, 436 U.S. 103, 111-12 (1978).

In short, the conflict between the Circuits is extensive and fundamental, and if not resolved promptly by this Court, will engender conflicting decisions in the lower courts. In fact, this has already been occurring in the District Courts. For example, in *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975), *aff'd in part, rev'd in part*, 610 F.2d 581 (9th Cir. 1979), *cert. pending sub nomine, State of California* v. *Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency* v. *Sierra Club* (No. 79-1502, filed Mar. 17, 1980); and *Sierra Club* v. *Andrus* (No. 79-1625, filed Apr. 16, 1980), the District Court adopted the reasoning of *Hudson Valley* and applied the ordinary meaning of the words "dike" and "dam" in finding certain structures to be subject to Section 9.[16] However, in *Petterson* v. *Resor*, 331 F. Supp. 1302 (D. Ore. 1971), the District Court declined to follow *Hudson Valley* and held that the term "dike" in Section 9 was narrower than its commonly accepted meaning. An appeal to the Ninth Circuit ensued, but the project was cancelled during the pendency of the appeal, and the Ninth Circuit thereupon vacated the decision below as moot. 494 F.2d 124 (9th Cir. 1974). In *Citizens Committee for Environmental Protection* v. *United States Coast Guard*, 456 F. Supp. 101 (D.N.J. 1978), the Court accepted the reasoning of *Petterson* and rejected *Hudson Valley* in finding that only those dikes which constitute an "unreasonable obstruction" to navigation are "dikes" for purposes of Section 9. Finally, of course, in the instant case, the District Court followed *Hudson Valley*, while the Court of Appeals

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[16] The Section 9 issue has not survived to the Supreme Court level in these cases and will not be before this Court if it grants *certiorari* therein. Nevertheless, No. 79-1252 presents an important issue concerning the relationship between Section 10 of the Act and state law. The Court may wish to consider accepting both that case and this one to determine the precise relationship between the various requirements for congressional, executive, and state approval of obstructions to navigation set out in Sections 9 and 10.

accepted the contrary interpretation of Section 9 presented in *Petterson.*

Without the intercession of this Court, the federal courts will doubtless continue to disagree upon the meaning of Section 9. Furthermore, the issue is now, after ten years of percolation in the lower courts, clearly ripe for this Court's review. Ten years ago when the Solicitor General petitioned for *certiorari* in *Hudson Valley,* he relied solely upon the substantiality of the question presented herein. Now that a conflict between the Circuits has developed, there should be no doubt as to the propriety of granting the writ.

II. This Case Presents An Important Question Of Federal Law Which Has Not Been, But Should Be, Resolved By This Court

This case presents an important question of federal law for two reasons. First, the project at issue is one of many which are being and will be undertaken nationwide, involving many millions of dollars, and potentially presenting the same issue. Second, the decision below may well cause numerous such projects to be begun, only to be discontinued later when this Court or another Court of Appeals rules that Congressional approval was in fact required, thus causing a substantial waste of federal and state funds.

A. There are and will continue to be numerous projects raising this issue

While the effect of the massive dike at issue herein would be quite substantial with regard to the Chesapeake Bay Region alone, the legal question presented has far broader implications. The proposed Hart and Miller Islands disposal facility represents but one of many similar diked disposal projects across the country. In fiscal 1979, the Corps of Engineers expended $324,000,000 to remove 282,000,000 cubic yards of dredged materials from the system of navigable waterways which includes 25,000

miles of waterways and 500 harbors; over the last decade, the Corps has expended well over three billion dollars on such projects.[17] In order to dispose of this enormous quantity of dredged material, the Corps has designed and authorized the construction of many diked disposal sites nationwide.[18]

Additionally, the question presented herein will assume increasing importance in the coming decades, as both federal and state governments have recently imposed stringent restrictions on open water disposal of polluted dredged materials. *See* Court of Appeals Opinion, App. 5 n.5, 17 n.10, 19. For example, one of the stated objectives of Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, is to control open water disposal of dredged materials. *See* 118 Cong. Rec. 33699 (1972) (remarks of Sen. Muskie).

Further, the 1977 amendments to the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566, 1577-78 (1977), have strengthened this policy by adding a new subsection (t) to Section 404, requiring that future federal dredging activities be consistent with state water quality regulations. In many states these regulations require confined disposal of dredged material. *See, e.g., Md. Ann. Code,* § 8-1602 (1979 Supp.); *N.C. Gen. Stat.* § 113-229(i) (1978); *Fla. Stat. Ann.* § 403.813(2)(f)(West 1980).[19]

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[17] Water Resources Support Center, U.S. Army Corps of Engineers, "Summary of Activities" (April 9, 1980).

[18] Office of Dredged Material Research, U.S. Army Corps of Engineers, "Practices and Problems in the Containment of Dredged Materials in Corps of Engineer Projects" Table 3, Appendix D (1974).

[19] Other indications of the evolving federal policy in favor of confined disposal of dredged material appear in the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified at 33 U.S.C. § 1401(b)), and in the Senate's ratification of the Convention on the Prevention of Marine

As a consequence of these legislative actions, use of confined disposal facilities like the Hart and Miller Islands project is expanding significantly, and the legal question whether such structures fall within Section 9 or 10 of the Rivers and Harbors Act is becoming even more significant.

Moreover, the import of the term "dike" in Section 9 also has significance apart from the movement toward contained disposal of dredgings. *Hudson Valley* involved a dike to retain fill for a road; *Petterson* dealt with an airport runway extension; and *Citizens Committee for Environmental Protection* v. *United States Coast Guard, supra,* concerned placement of fill behind retaining walls for a highway extension. Other projects where the Corps has issued permits for "dikes" have involved the creation of parks and recreational areas, railroad embankments, and the enlargement of forts.[20]

B. The erroneous decision below may cause the waste of millions of dollars

The decision below is plainly wrong. Permitting it to go unreviewed at this time may well waste millions of dollars of federal and state funds. The Corps will undoubtedly be emboldened by this decision, and will consistently process permits for similar dikes without Congressional approval. Moreover, even in those cases where environmental groups, citizens or individual congressmen have the interest and wherewithall to challenge such actions, District Courts may initially be swayed by the Fourth Circuit's decision herein, with its veneer of careful legislative and administrative analysis. While we are confident that Section 9 will ulti-

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Pollution by Dumping of Wastes and Other Matter. 119 Cong. Rec. 28012 (1973).

[20] *See Parker* v. *Citizens Committee for the Hudson Valley,* Reply Brief in Support of Certiorari 7-8 (No. 614, October Term, 1970).

mately be interpreted correctly by this Court and the other Courts of Appeal, awaiting that eventuality, which will stop projects like the instant one in midstream, will be exceedingly costly and inefficient.[21]

The Fourth Circuit erred in interpreting Section 9 of the Act by failing to abide by the principles of statutory construction reiterated by this Court on numerous occasions. As illustrated above, the plain meaning of the term "dike," buttressed by various dictionary definitions and by the consistent use of that term by the Corps to describe this very project, indicates that the structure at issue is a "dike" for purposes of Section 9. Congress' additional language—that such dikes may be "over *or in*" navigable waterways—confirms this conclusion, and illustrates the impropriety of any contention that Section 9 dikes must completely span a waterway.

The Court of Appeals, however, concluded that dikes which do not entirely span a body of water are not dikes for this purpose. Under this approach, a dike (in the common sense of the word) which blocked 90 percent of the width of the Mississippi River would not be a dike for purposes of Section 9, and its construction would not require congressional approval. However, construction of a bridge across the Mississippi (which might well obstruct navigation to a far lesser extent) would require congressional approval. The basis for this illogical conclusion was an uncritical, virtually verbatim adoption of the Corps' arguments based upon what it called legislative and administrative history. However, these arguments are fatally flawed in numerous ways.

First, in order to avoid applying the plain meaning of the term "dike," the Court of Appeals accepted the Corps' invitation to find the term ambiguous. As noted above, this

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[21] *See TVA* v. *Hill*, 437 U.S. 153 (1978); *Hudson Valley*, *supra*, 425 F.2d at 105.

supposed ambiguity derived from the Fourth Circuit's reading of *Wisconsin* v. *Illinois, supra,* 268 U.S. at 413, a case dealing not with Section 9, but with the interrelationships of the three clauses in Section 10. Because this Court found those relationships ambiguous, the Fourth Circuit concluded that the holding "probably" covered "Section 9 as well" (App. 7).

Having found Section 9 ambiguous, the Court of Appeals proceeded to examine its legislative history. However, rather than relying upon anything that was said at the time concerning Congress' intentions, the Court adopted the Corps' speculation that the congressional consent requirement in Section 9 may have been attributable to certain *dicta* in *United States* v. *Keokuk & H. Bridge Co., supra,* and *United States* v. *Rider, supra.* The Court of Appeals reasoned that since those cases "limited Congressional power to delegate authority over two structures that completely spanned navigable rivers . . . Section 9 *may well have been* intended to require Congressional approval only where agency approval would have been an unconstitutional delegation of legislative power, *i.e.,* for [structures] that completely span navigable waterways." (App. 15) (emphasis added).

Not only was this speculation unnecessary since Congress did not *add* the congressional consent requirement in 1899, *see* p. 6 *supra,* but it is also unconvincing for several reasons. First, there is no indication whatsoever that Congress was aware of these decisions or was taking cognizance of them in amending the Act. Second, these *dicta* were rejected before passage of the 1899 Act and thus were not even prevailing law at the time.[22] Third, *Keokuk* and *Rider* do not even stand for the suggested proposition, but instead for the narrower proposition that Congress may not delegate to the executive the authority to order alterations in bridges previously authorized by Congress.

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[22] 21 Op. A.G. 430, 436 (1896); *United States* v. *City of Moline,* 82 F. 592 (N.D. Ill. 1897).

In any event, such pure speculation about legislative intent is clearly inappropriate. *Maine* v. *Thiboutot, supra,* —— U.S. ——, slip. op. 5-7; *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 556-58 (1944).[23]

The Fourth Circuit then proceeded to buttress this "legislative history" with purported administrative practice. Considering such materials as a 1926 lecture, isolated Congressional testimony in 1916, a Corps regulation promulgated after the commencement of this lawsuit and an affidavit filed in connection with another case, the Court found evidence of a consistent administrative practice "of over eighty years." (App. 17). This paltry material, however, simply does not demonstrate a long-standing administrative interpretation sufficiently weighty to overcome the clear statutory language to the contrary.[24]

Moreover, the Corps' reliance on its allegedly consistent administrative practice does not serve as a defense to the claim that it exceeded its jurisdiction when it issued the permit in question. In the words of this Court, the proposition that the construction of a statute by the agency

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[23] If the Court truly wished to determine congressional intent, it could have examined the contemporaneous usage of the term "dike" by Congress. In both the 1890 and 1894 River and Harbors Acts, Congress prohibited certain actions which would impair or injure any "seawall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States in whole or part, for the preservation and improvement of any of its navigable waters, or to prevent floods . . . ." Rivers and Harbors Act of 1894, § 6, 27 Stat. 363; Rivers and Harbors Act of 1890, § 9, 26 Stat. 454. In this context Congress clearly envisioned dikes in or along and not necessarily across navigable waterways. *See also Gibson* v. *United States,* 166 U.S. 269 (1897) ("dike" in Ohio River).

[24] The lecture and congressional testimony relied upon are clearly not the type of evidence necessary to demonstrate a consistent administrative practice. The affidavits also miss the mark since they primarily demonstrate Corps approval of dikes within harbor lines, or in bodies of navigable water which touch only one state, both of which are outside the explicit language of the first clause of Section 9.

charged with its administration should be given great weight

> "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

See S.E.C. v. *Sloan*, 436 U.S. 103, 118-19 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

Finally, the Fourth Circuit attempted to legitimate the tenuous evidence of administrative practice with the argument that, as a result of the consideration of the Federal Water Pollution Control Act Amendments of 1972, Congress "was not only aware of, but approved and encouraged the Corps' practice." (App. 18). However, the evidence of congressional approval, or even awareness, falls far short of the standards for such a showing outlined by this Court. *See S.E.C.* v. *Sloan, supra*, 436 U.S. at 120-21.

In any event, there is no real indication that Congress was ever made aware of, much less approved, the Corps' interpretation of Section 9. The Fourth Circuit's discussion of the 1972 legislation and its history rests on the faulty assumption that references to "disposal sites" are to dikes. In fact, "disposal sites" refers to any location suited to that purpose, either on land or water. Moreover, the reference to Representative Vanik's comments (App. 18), rather than supporting the Court of Appeals' holding, demonstrates its error. As noted above, Congress expressly exempted construction of diked disposal sites in the Great Lakes from the consent requirement of Section 9.[25] Contrary to the Fourth Circuit's implication that the long list of land or diked disposal sites inserted in the Congressional Record alerted Congress to the Corps' practice un-

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[25] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, §§ 101, 123, 84 Stat. 1818, 1823 (1970).

der Section 10, this episode confirms the congressional understanding that Section 9 applies to such dikes and that they must be expressly exempted from Section 9 if that is Congress' desire.

In sum, the Fourth Circuit's reliance upon these various legislative and administrative materials simply does not support its decision to ignore the plain meaning of the statute. Given the length of its opinion and its veneer of careful analysis of legislative and administrative history, however, the decision below may lead some courts to permit projects like the one at issue to proceed without Congressional consent. A ruling thereafter from this Court or another Court of Appeals, following the Second Circuit's reasoning in *Hudson Valley,* will halt those projects, thereby causing untold waste of public funds. The situation requires a definitive ruling from this Court at this time.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 22, 1980

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 78-1911, 78-1912, 79-1037

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees,

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Appellants,

and

STATE OF MARYLAND, Ex Rel, FRANCIS B. BURCH, Attorney General, Steamship Trade Association of Baltimore, Inc.,

Intervening Defendants/Appellants

OPINION

Appeals from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

Argued May 7, 1979 Decided May 28, 1980

Before WIDENER and HALL, Circuit Judges, WARRINER, District Judge*

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* United States District Court for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

The State of Maryland applied to the U.S. Army Corps of Engineers (the Corps), in 1972, for a permit pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, to construct a diked disposal area for dredged material on and adjacent to Hart and Miller Islands in Chesapeake Bay. The purpose of the project is to provide a site for dumping material dredged from the bottom of Baltimore Harbor and its approach channels. This material will include spoil from maintenance dredging and spoil produced by the Baltimore Harbor Channel Project, which is a Corps project designed to increase the depth of Baltimore Harbor.[1]

The Corps held a public hearing on the proposal in August 1972 and completed a draft environmental impact statement in February 1973. Action on the Maryland application was delayed in order to comply with Section 404 of the Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816, 844, 33 U.S.C. § 1344. A second public hearing was held in May 1975, see 459 F.Supp. 281-282, and additional written comments were received in response to circulation of the draft environmental impact statement. The Corps issued a final environmental impact statement in February 1976. The Secretary of the Army, in November 1976, acting through the Corps, issued a permit to the State of Maryland, under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Federal Water Pollution Control Act of 1972, authorizing construction of the diked disposal facility.

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[1] Congress authorized the Baltimore Harbor Channel Project with the understanding that the State of Maryland would provide a disposal area for the spoil to be produced. Rivers and Harbors Act of 1970, Pub. L. 91-611, § 101, 84 Stat. 1818; H.R. Rep. No. 1665, 91st Cong., 2d Sess. 10 (1970).

Two environmental groups and a number of individuals commenced this action against the Corps in June 1977, seeking declaratory and injunctive relief voiding the permit. The complaint alleges that the Corps lacks the authority to issue the permit under Section 10 of the Rivers and Harbors Act because the barrier to surround the fill constitutes a "dike" which requires Congressional approval under Section 9 of that act, 33 U.S.C. § 401. The State of Maryland and the Steamship Trade Association of Baltimore intervened as defendants. All parties filed cross-motions for summary judgment in May 1978. 459 F.Supp. 280.

The district court granted the plaintiffs' motion for summary judgment and denied the motions filed by the defendants. *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers,* 459 F.Supp. 279 (D. Md. 1978). The court held that the Corps could not authorize construction of the disposal facility because it was a dike within the meaning of Section 9 of the Rivers and Harbors Act of 1899 and therefore required Congressional approval.

Section 9 of that statute requires the consent of Congress for the construction of "any bridge, dam, dike, or causeway over or in" any navigable water of the United States.[2] Under Section 10 of the same act the authorization

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[2] Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, now reads:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided

of the Secretary of the Army is sufficient for the construction of "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures."[3] The sole issue decided in this appeal is whether the Hart and Miller Islands diked disposal area is subject to Section 9 or Section 10 of the Rivers and Harbors Act. We hold that the structure is not a dike within the meaning of Section 9 and is governed by Section 10 of the statute. Therefore, it does not require Congressional approval. We thus approve the issuance of the permit by the Corps and reverse the district court.

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the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

[3] Section 10 of the Rivers and Harbors Act of 1899 is now 33 U.S.C. 403:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters to the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Baltimore Harbor and its nearby navigation channels have been dredged many times in the past. Dredging will continue, both to maintain existing channels and to increase the depth of the harbor and channels.[4] An estimated 100 million cubic yards of bottom sediment will be dredged from Baltimore Harbor and nearby channels in the next twenty years. Historically, the dredged material has been dumped in the open waters of Chesapeake Bay. Such open water dumping causes pollution in the vicinity of the disposal site since the dredged bottom sediment contains toxic chemicals, heavy metals, oil, grease, and other substances. The spoil material deposited by open water dumping, of course, may also damage bottom dwelling fauna.[5] The disposal area is designed to improve the water quality of Upper Chesapeake Bay by the elimination of open water dumping.

Hart and Miller Islands are privately owned, contain no permanent structures, and are used by a limited number of boaters for recreation (without the owner's permission). There are beaches and wetlands on both islands, and part of Hart Island is forested. Both islands have a serious erosion problem which has decreased the area of Hart Island from 150 acres in 1933 to 120 acres in 1967, and de-

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[4] In 1970, Congress authorized funds for the Baltimore Harbor Channel project, which will deepen the Harbor and its approach channels to a depth of fifty feet. The present depth is from thirty-nine to forty-two feet. Rivers and Harbors Act of 1970, Pub. L. 91-611, § 101, 84 Stat. 818.

[5] Open-water dumping has been the subject of continuous criticism. As a consequence, the State tells us without contradiction that in 1969 the Maryland legislature authorized the expenditure of $13,000,000 for the design and construction of one or more containment areas to act as a receptacle for spoil dredged from Baltimore Harbor and the approach channels. Recognizing the deleterious environmental effects of open water dumping, in 1975 Maryland prohibited the discharge of spoil from Baltimore Harbor unless it was deposited in containment facilities. Md. Ann. Code, Sec. 8-1602.

creased the area of Miller Island from 50 acres in 1933 to 33 acres in 1967. The maximum elevation of either island is 5.5 feet.

The disposal area will be 1,100 acres, approximately 12,430 feet by 4,700 feet, and will contain 52 million cubic yards of sediment when filled to its capacity of 18 feet above mean low water. About 52 percent of Miller Island (18.4 acres) and 11.5 percent of Hart Island (10.9 acres) will be covered by the facility. The dike will be constructed from sand deposits adjacent to and underlying the enclosure, and the face toward the bay will be rip-rapped with stone. Three sluice gates will be provided to prevent overtopping and washout of the dike. The islands are approximately one mile from the nearest point on the mainland, the western side of the bay. The containment area will be located on the eastern or bay side of the islands. The dike will extend from Hart and Miller Islands no more than 4,700 feet into the Bay in an area where the Bay is about 7 miles wide. Essentially the area is made by connecting Hart and Miller Islands with a wall, and, using the islands as two corners, then extending other walls into the Bay at right angles to the connecting wall between the islands, the ends of the walls extended into the Bay then being connected by another wall.

The dredged material will be retained in the disposal area for months or years. Sediment will settle and water will slowly percolate through the bottom of the dike until a water-level equilibrium is reached. All particulate matter will be retained in the containment area. While the Harbor spoil can be expected to contain substances that exert a biochemical oxygen demand, the slow filtration through the dike walls will eliminate the oxygen demand before the filtrate reaches the Bay. Sedimentation and filtration, coupled with the long retention period, will effectively remove and destroy any pathogenic bacteria that might be present in the Harbor mud.

The Army Corps of Engineers processed the permit application under Section 10 of the Rivers and Harbors Act. Since the adoption of that statute, the Corps has consistently interpreted Section 9 as requiring Congressional approval only for structures which completely span a navigable waterway. Under Section 10, the Corps has administratively authorized structures which do not extend entirely across a waterway, no matter how large and whether or not called dikes. See *infra* at 23-24. The Corps argues that the statute is ambiguous and therefore the paucity of case law emphasizes the significance of the relevant legislative history and administrative practice and interpretation. The Supreme Court has held in a case involving this very statute that we should look to the administrative construction thereof, and has also held at least Section 10 is ambiguous and probably Section 9 as well. In *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929), the Court upheld the validity of a Section 10 permit authorizing diversion of water from Lake Michigan, rejecting the argument that the diversion required Congressional approval because it constituted an obstruction to navigation. After briefly describing the legislative history of the Rivers and Harbors Act of 1899, the Court stated:

> Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . . .

> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. . . .
>
> The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. . . . The fact that the Secretary of War acted on this view was made known to Congress by many reports.

278 U.S. 367, 412-414 (Citations omitted).

Very few cases have dealt with Section 9 and the meaning of the word dike. *Citizens Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), aff'd 425 F2d 97 (2d Cir. 1970), cert. denied (sub nom *Parker v. Citizens Comm. for Hudson Valley*), 400 U.S. 949 (1970), involved a permit to construct an expressway along the east bank of the Hudson River. The construction protruded into the river. The district court held that Congressional consent was necessary for construction of a rock dike parallel to the shore of the river, designed to contain fill and thus create new land to support the highway. Relying on dictionaries, the court applied the ordinary meaning to the term dike as used in Section 9. 302 F.Supp. at 1088-89. The Court of Appeals affirmed in an opinion primarily concerned with questions of standing and jurisdiction, which only "briefly" addressed the merits. 425 F2d 97, 196.

The Corps and the State argue that the record before the court in *Hudson Valley* was deficient because it did not contain the full legislative and administrative history materials presented to the court below in this case.

In *Petterson v. Resor,* 331 F.Supp. 1302 (D. Or. 1971), remanded as moot, 494 F2d 124 (9th Cir. 1974), the court did not have the benefit of legislative and administrative history materials, and adopted a more limited interpretation of Section 9. The project at issue involved depositing fill, surrounded by a retention structure, in the South Slough of the Columbia River in order to support an airport runway extension. The district court determined that the project did not involve dikes (within the meaning of Section 9) because Congressional consent was required only "for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation." 331 F.Supp. 1302, 1306. The court held that the runway extension did not obstruct navigation and thus Congressional approval was not required. The case became moot because the Port of Portland formally withdrew its plan to enlarge the airport, and as a result the Corps of Engineers canceled the permit. *Citizens Committee for the Columbia River v. Callaway,* 494 F2d 124, 125 (9th Cir. 1974).

A 42 mile canal was at issue in *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Calif. 1975). Because the structure, labeled a canal, would cross and completely dam and obstruct a navigable river, the court determined that it was a "dam" or "dike" within the meaning of Section 9. 400 F.Supp. 610, 626-27.

The challenged project in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F.Supp. 101 (D. N.J. 1978), involved placement of fill behind retaining walls in the Raritan River, in order to support a highway extention. Rejecting the plaintiffs' argument that the fill constituted a dam or dike, the court de-

termined that the critical question was whether the activity constituted an unreasonable obstruction to navigation. Since the impact of the project on actual navigation was negligible, the court held the Corps was justified in determining that Section 9 did not apply, 456 F.Supp. 101, 113-14, and that a Section 10 permit was sufficient.[6]

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[6] Other courts, without addressing the issue, have applied Section 10 to dikes that do not span a waterway. In *United States* v. *Bailey*, 467 F.Supp. 925 (E.D. Ark. 1979), the Corps had issued a permit, pursuant to Section 10, for the construction of a dike extending into but not across the Arkansas River. The court held that the Government was estopped from asserting that the dike was constructed in violation of a restriction embodied in the Corps' permit.

In *United States* v. *Cameron*, 466 F.Supp. 1099 (M.D. Fla. 1978), it is apparent that both the court and the parties would have applied Section 10 to a dike but for the fact that the dike was located above the ordinary high water mark.

Magno v. *Corros*, 439 F.Supp. 592 (D. S.C. 1977), was a wrongful death action arising out of the collision of a boat with a rock dike protruding 1,100 feet into a river. The court noted that the United States had clear authority to construct the dike, citing Section 10. 439 F.Supp. at 599.

One other court would have applied Section 9 to a dike that did span a waterway. *Environmental Defense Fund* v. *Alexander*, 467 F.Supp. 885 (N.D. Miss. 1979), was a challenge to construction of the Tennessee-Tombigbee Waterway which Congress authorized in 1946. A quarter of a century later, the Corps authorized modifications in the still uncompleted project to add dams, dikes, and causeways. The court held that construction of "dikes or causeways across the Tibbee and Tombigbee River," without specific Congressional approval, would violate Section 9 but for the fact that the structures were temporary and, upon completion of the project, would be covered by thirteen feet of water. 467 F.Supp. at 911. The court relied on *Sierra Club* and *Hudson Valley*, but, since the structures extend across the river, the holding is consistent with *Petterson*.

The court also held that a project modification to replace levees along the side of the waterway with five dams across the canal section of the waterway was within the Corps' discretion and did not constitute a violation of Section 9 although the damming structures extended across the waterway.

Plaintiffs claim that the language contained in the Rivers and Harbors Act is clear, and that its plain meaning should control without reference to legislative history or administrative practice. The few decided cases do not support this argument. Plaintiffs in *Petterson v. Resor* relied on *Hudson Valley*, but the *Petterson* court refused to do so. In *Sierra Club v. Morton*, the court professed to follow *Hudson Valley*, but its holding is consistent with *Petterson*. *Citizens Committee for Environmental Protection* declined to follow either *Hudson Valley* or *Sierra Club* and instead applied the test of *Petterson*. If the language we have quoted from *Wisconsin v. Illinois* is not sufficient, these conflicting interpretations of Section 9 demonstrate that the language is not clear and has no plain meaning apparent to the courts.

As the nation grew and expanded in the nineteenth century, State legislatures authorized construction of dams and bridges that blocked waterborne commerce on navigable rivers. Challenges to these actions resulted in Supreme Court holdings that, in the absence of federal legislation to the contrary, the States had the power to authorize construction of bridges, dams, or other structures even if they obstructed navigation.[7] Congress responded by providing for affirmative federal regulation of obstructions to navigation in order to control the proliferation of bridges which obstructed commercial river navigation. 21 Cong. Rec. 8602-05, 8607, 8684, 9813 (1890); see 40 Cong. Rec. 1717 (1906). Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 453, 454, in general terms, prohibited the construction of all obstructions to navigation unless ap-

[7] The Supreme Court rejected claims that the common law of the United States prohibits obstructions in our navigable waters, *Williamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888), and that language in State enabling acts declaring that navigable waters must remain "forever free" was an expression of Congressional intent to prohibit State authorized obstructions. *Id.* at 12; *Cardwell* v. *American River Bridge Co.*, 113 U.S. 205 (1885).

proved by the Secretary of War.[8] The first clause of that section prohibited building any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or other structure, not within established harbor lines, so as to obstruct or impair navigation, without the permission of the Secretary of War. The second clause prohibited the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works, over or in any navigable waters, under any act of the legislative assembly of any State, unless approved by the Secretary of War.

Congress, in 1896, directed the Secretary of War to prepare a compilation of existing laws relating to the pro-

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[8] Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state.

tection of navigable waters, along with suggestions for a revision. Rivers and Harbors Act of 1896, Section 2, 29 Stat. 202, 234. The Corps of Engineers submitted the draft revision along with the compilation in 1897. After the Rivers and Harbors Bill of 1899 had been passed by the House (H. R. 11795; 32 Cong. Rec. 1408 (1899)), the Corps' draft was introduced in the Senate as an amendment to the bill with the representation that it, except amendments, was in accord with existing statutes. 32 Cong. Rec. 2296-2297 (1899). The Senate passed the bill, as amended, the same day. 32 Cong. Rec. 2302. The Conference Committee accepted the amendments and renumbered the relevant portions as Sections 9 and 10. The House Conferees presented the final bill to the House with the following statement:

> The bill as now agreed upon and presented also includes a codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law. 32 Cong. Rec. 2923.

Both houses accepted the Conference Report, and the bill, as drafted by the Corps, became law. 32 Cong. Rec. 2843, 2925, 2934 (1899). Thus, the Corps' draft became Sections 9 and 10 of the Rivers and Harbors Act of 1899. Congress passed the Act, without carefully examining its provisions, on the strength of representations that the Act made no significant change in existing law. As the Supreme Court put it, "Sections 9 and 10 [of the 1899 Act] were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890."[9] *Wisconsin v. Illinois,* 278 U.S. 367, 412

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[9] A close examination of Sections 9 and 10 and their predecessor provisions resolves any apparent inconsistency between the Supreme Court's statement that Sections 9 and 10 of the 1899 Act are derived from Sections 7 and 10 of the 1890 Act, and our taking clauses 1 and 2 of Section 7 of the 1890 Act as the relevant predecessor provisions. Both of the clauses at issue here (Section 9, clause 1 and Section 10, clause 2, of the 1899 Act) are derived

(1929). It is entirely proper to interpret the ambiguous 1899 Act in light of its predecessor statutory provisions.

As stated, the issue in the present case is whether the Hart and Miller Islands disposal area is governed by the second clause of Section 10 or the first clause of Section 9 of the 1899 Act. The second clause of present Section 10 (33 U.S.C. § 403) derives from the first clause of Section 7 of the 1890 Act. The only significant change is that dam is not among the structures listed in the present Section 10. The first clause of Section 9 (33 U.S.C. § 400) derives from the second clause of Section 7 of the 1890 Act, which referred to works authorized by State legislatures.

A comparison of the 1890 and 1899 statutes, however, reveals there was in fact a change from 1890, when all authority was delegated to the Secretary of War, to 1899, when a part was reserved to Congress. Remembering the representations in Congress of no substantial change, that change is understood in light of *United States v. Keokuk & H. Bridge Co.*, 45 Fed. 178 (S.D. Iowa 1891) and *United States v. Rider*, 50 Fed. 406 (S.D. Ohio 1892). Both cases dealt with Congressional delegation, to the Secretary of War, of the power to compel alteration of bridges that obstruct navigation, parts of the Rivers and Harbors Acts. In broad dictum, the first case indicated it would be an unauthorized delegation of power by Congress to "confer upon the secretary of war the power to determine when and where bridges should be built over the navigable rivers of the country," 45 Fed. 178, 183, and held invalid the delegation of power to the Secretary of War to declare lawfully constructed bridges to be obstructions to naviga-

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from Section 7 of the 1890 Act. Clause 1 of Section 10 of the 1899 Act, which prohibits "the creation of any obstruction" to navigable waters without authorization, and which is not at issue here, is derived from the first sentence of Section 10 of the 1890 Act. *Compare* 30 Stat. 1151, 33 U.S.C. §§ 401, 403, *with* 26 Stat. 453, 454 and 27 Stat. 110.

tion. The second case, construing the Rivers and Harbors Act of 1890, relied upon the first and held that the statute impermissibly delegated legislative power. 50 Fed. 406, 410. These cases thus limited Congressional power to delegate authority over two structures that completely spanned navigable rivers. Neither case dealt with obstructions that did not span navigable waters. Section 9 of the 1899 Act differs from its predecessor because it requires Congressional approval, and it adds dams and dikes to the list of structures affected. The legislative history of the Act together with the then prevailing precedents, *Keokuk* and *Rider*, indicate that Section 9 may well have been intended to require Congressional approval only where agency approval would have been an unconstitutional delegation of legislative power, i.e. for bridges, causeway, dikes, or dams that completely span navigable waterways. In all events, this is a perfectly reasonable construction of the statute, and it has been so construed by the Corps since its passage. Taking the view of the structures listed in Section 9 of the 1899 Act, two are works which, by definition, span waterways (bridges and dams). Dikes as used in that section, according to this construction, should be interpreted to include only dikes that span waterways.

The Corps of Engineers, the agency that wrote the statute and is charged with its execution, has interpreted Section 9 as applying only "to that class of structures such as bridges and dams which extend entirely across a waterway." Lecture of Judge G. W. Koonce, O.C.E. to Company Officer's Class, Engineer School Fort Humphrey's, Virginia, April 23, 1926, as reproduced in Hearings on Water Pollution Control Legislation—1971 (Oversight of Existing Programs) Before the House Committee on Public Works, 92nd Cong., 1st Sess., Ser. 92-10, 284-291, at 288 (1971). Section 10, according to the Corps, "relates to the construction of works in the nature of wharves, piers, jetties, and the like, which project into, rather than cross, the bodies of water in which they are located." *Id.* at 289. The Secretary

of War, in testimony before the House Commerce Committee in 1916, stated that Section 10 gives his department "the authority to permit or refuse to permit any obstruction, except the class which extend clear across a stream, however large and important, in any navigable water of the United States." Hearings on General Dam Legislation Before the House Committee on Interstate and Foreign Commerce, 64th Cong., 1st Sess., at 18 (1916). The then Chief of the Miscellaneous Civil Branch of the Corps of Engineers, James E. DeSista, summarized the Corps' interpretation and practice in an affidavit originally prepared for the *Petterson* case which was also before the court below.

> It has been my interpretation, and that followed by my predecessors in office, that the terms "dike" and "causeway" as used in Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, refer to a structure which results in the closure of a navigable waterway by extending completely across same so as to block navigation if no provision is made for its passage. The building of a bulkhead, retaining wall, or revetment behind which solid fill is placed in navigable waters for use as a retaining structure has been administratively interpreted to constitute a class of structures which can be authorized by the Secretary of the Army under Section 10 of the Act, 33 U.S.C. 403, notwithstanding that such bulkheads, retaining walls, or revetments are frequently referred to in the vernacular as dikes or causeways.

Affidavit of James E. DeSista, August 6, 1970.

The DeSista affidavit lists 20 "significant solid fill retaining structures" that have been authorized under Section 10, dating from 1920 to 1969. *Id.* The affidavit of John P. O'Hagan, Chief of the Operations Division of the Baltimore District of the Corps, submitted to the court below,

confirms the DeSista affidavit and also lists 25 diked disposal areas authorized by the Baltimore District alone during fiscal years 1972 through 1977.[10] Affidavit of John P. O'Hagan, May 18, 1978. The Corps' regulations implementing Section 9 of the 1899 Act, as amended in 1977, define a dike as

> an embankment, low dividing wall or other protective structure that completely spans a navigable waterway of the United States and that may obstruct interstate waterborne commerce.

33 C.F.R. 321.2(c), 42 Fed. Reg. 37139. While prior regulations contained no such explicit definition of dike, published regulations giving effect to the Corps' interpretation are found in the Code of Federal Regulations since its inception. See, e.g., 33 C.F.R. 209.120 (1948); 33 C.F.R. 209.120 (b)(1)(a) (1969); 33 C.F.R. 209.120 (1974).

In construing Sections 9 and 10, we are guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969).

The Corps' interpretation deserves more than usual deference in this case for several reasons. It drafted the bill which became the 1899 Act, and administers both Sections 9 and 10 of the Act, and therefore has special familiarity with the interrelationship between the two sections. The Corps has interpreted and administered the Act consistently for a period of over eighty years. The Supreme Court, in *Wisconsin v. Illinois, supra,* specifically sanctioned reliance upon the Corps' administrative interpretation and administration of the Act. As early as 1916

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[10] In 1972 Congress amended the Federal Water Pollution Control Act to encourage the use of dike disposal facilities. See *infra,* pp. 26-28.

the Secretary of War made the Corps' view known to Congress. Judge Koonce's speech, for example, stating the Corps' interpretation that Section 9 only applies to structures which extend completely across a waterway, was submitted to Congress during 1971 hearings on water pollution control legislation. See *supra*, p. 15-16.

The legislative history of the Federal Water Pollution Control Act Amendments of 1972 demonstrates that Congress was not only aware of, but approved and encouraged the Corps' practice of issuing permits for diked disposal areas, without specific Congressional approval. Section 404 (a) of the FWPCA, 86 Stat. 816, 884, 33 USC § 1344(a), provided:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.[11]

In the House, Representative Vanik spoke to federally funded programs to halt the open-water disposal of dredged spoil. He sought and received assurances that Section 404 would not terminate the Corps' existing program of placing polluted dredgings "in dike or land sites," as opposed to open-water dumping. Legislative History of the Water Pollution Control Act Amendments of 1972, p. 421. He stated that the Corps of Engineers gave him "a list of the harbors where dredgings were being placed in land or diked disposal sites," and inserted the data in the Congressional Record. Representative Vanik's concern was that not enough harbors were included in the program. *Id.* at 422.

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[11] In 1977 Congress amended this section, in immaterial ways that are not relevant here. 33 U.S.C. § 1344(a), Pub. L. 95-217, 91 Stat. 1566.

During Senate consideration of the Conference Report, Senator Muskie, the primary Senate manager for the bill, reported.

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.
>
> . . .
>
> At the same time, the Committee expects the Administrator (of the Environmental Protection Agency) and the Secretary (of the Army) to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes—to identify land-based sites for the disposal of dredged spoil and, where land-based disposal is not feasible, to establish diked areas for such disposal.
>
> All of these alternatives are available.

118 Cong. Rec. 33699 (1972). Congress, when it authorized the Baltimore Harbor Channel Project in 1970, gave an indication of its understanding that its further approval was not needed for diked disposal facilities. That Congress expected the dredged spoil to be placed behind retaining structures such as the dike at issue here is shown in the House Report:

> *Local cooperation.*—Provide without cost of all lands, easements, and rights-of-way for construction and maintenance of the project and for aids to navigation, including spoil disposal areas, retaining dikes, bulkheads and embankments or the costs of such retaining works. . . .

H.R. Rep. No. 1665, 91st Cong., 2d Sess., 10 (1970).

For most of this century at least, Congress has been aware of the Corps' interpretation of the Act. When it amended the Federal Water Pollution Control Act, Congress was well acquainted with the prevailing Corps' practice of authorizing diked disposal areas pursuant to Section 10 of the 1899 Act. Congress has never interfered with this long-standing administrative practice. Even if it has not in terms ratified the Corps' practice, Congress at least considers the practice to be consistent with the Act. See *Boesche v. Udall*, 373 U.S. 472, 483 (1963).

Sections 9 and 10 of the Rivers and Harbors Act of 1899 must be construed together in a logical and consistent manner in order to best effectuate the intent of Congress. A logical distinction between those structures listed in Section 9 (which require Congressional approval) and those listed in Section 10 (which do not) is that the former class of structures completely span a waterway, while the latter do not. Section 9 structures are capable of completely blocking a navigable waterway, while Section 10 structures merely protrude into a waterway and require only a rerouting of waterborne traffic. Since Section 9 structures usually necessarily destroy navigation, they require Congressional approval. Since Section 10 structures do not usually or necessarily destroy, but merely obstruct, navigation, they require only Corps approval.

Finally, as the *Petterson* court noted, the expansive reading of Section 9 put forward by the plaintiffs could render Section 10 meaningless, since structures such as jetties, breakwaters, and fills would be covered by Section 9 although they are literally within Section 10. Limiting Section 9 to waterway-spanning structures, as the Corps has done, provides a clear, convenient, and workable distinction between Section 9 and Section 10. This construction is reasonable and is supported by the legislative history of the statute.

We hold that the Corps of Engineers acted correctly in processing the application for the Hart and Miller Islands diked disposal facility under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Accordingly the judgment appealed from is

REVERSED.

Filed: May 28, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., and HONORABLE CLARENCE LONG, M.C., and HONORABLE NORMAN R. STONE and MARYLAND WILDLIFE FEDERATION, INC. and JOHN HENDERSON and HOWARD SAPPINGTON and GEORGE WOHLLEBEN and ROBERT SCOTT and MARGARET CALDWELL and CHARLES JUSTICE

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES and HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army, and LT. GEN. JOHN W. MORRIS, Chief of Engineers of the United States Army and COL. G. K. WITHERS, District Engineer, Baltimore District, U.S. Army Corps of Engineers

STATE OF MARYLAND, *ex rel.* FRANCIS B. BURCH, ATTORNEY GENERAL OF MARYLAND

MEMORANDUM AND ORDER

On June 30, 1977, a number of environmental groups and interested individuals filed suit against the Corps of Engineers (hereinafter the Corps), seeking in an eleven count complaint relief from the issuance of a permit by the Corps to the State of Maryland for the construction of a dike and disposal area in the Chesapeake Bay. On October 10, 1977, this court granted the motions of the State of Maryland and the Steamship Trade Association of Baltimore, Inc. to intervene as defendants in this action. Since that time, all parties have engaged in extensive discovery and on May 31, 1978 all parties filed cross motions for summary judgment. The motions for summary judgment were the subject of oral argument on June 21, 1978 and it is the purpose of this memorandum and order to rule on these motions.

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Background

On February 23, 1972, the State of Maryland, through its Department of General Services, filed an application with the Corps for a permit under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, (sometimes herein referred to as the Act) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972, as amended, 33 U.S.C. § 1344, to construct a dike and dredged spoil disposal facility at Hart and Miller Islands in the Chesapeake Bay. The stated purpose of the dike and disposal area is to contain approximately fifty-two million cubic yards of dredge spoil to be removed from the Baltimore Harbor and its channel approaches.

Hart and Miller Islands are located within Chesapeake Bay approximately thirteen miles east of Baltimore, Maryland. The dike and containment area is to be constructed on the bayward (eastern) side of Hart and Miller Islands about one mile from the mainland and will occupy an area of 1,100 acres or approximately two square miles. The dike itself is to be constructed with sand which will be dredged from deposits within the disposal area. Construction is estimated to take two years.

When the dike is completed, its walls will stand eighteen feet above mean low water, somewhat higher than the current maximum elevations of Hart and Miller Islands which are 5.5 feet and 2.3 feet, respectively. However, only twelve percent of Hart Island and fifty-two percent of Miller Island will be covered by the disposal area. Basically, the disposal area will be rectangular in shape with the islands fitting in to the northwestern, longer side of the area and the structure occupying principally an area to the southeast of the islands.

Dredged spoil will be transported to the disposal area by pumping the material through hydraulic pipelines either from the dredging sites in the Baltimore Harbor or from barges which will carry the dredged spoil from the dredging site to the disposal area. The dredged material will be

pumped into the diked containment area and the sand walls of the dike will allow the water to percolate out of the containment area, leaving only the dredged material inside of the containment area. Once the area has been completely filled with dredged spoil, the entire area will be at the height of eighteen feet above mean low water. As a means of protection against erosion on the bayward side of the structure, this side will be rip-rapped with stone, all other sides consisting of the sand constructed walls of the dike.

At present, the expected life of the containment area is uncertain. If the area is used only for the disposal of dredging spoil from maintenance dredging of the Baltimore Harbor and other shipping channels, the expected life of the area is twenty to thirty years. If the area is used to accommodate dredged material from the Baltimore Harbor Channel project, its life expectancy is ten years. The Baltimore Harbor Channel project is a project to deepen the Harbor and its channel approaches from the present depth of thirty-nine to forty-two feet to a depth of fifty feet in order to allow the entry of larger cargo vessels. Congress has authorized the funds for this project (Public Law 91-611) provided the State of Maryland furnishes a disposal site for the dredged spoil from the project. It is estimated that the total dredged spoil from the project will amount to one hundred million cubic yards thus indicating that the Hart and Miller Islands project will accommodate, at best, only fifty percent of this spoil.

After the filing of the application for a permit by the State of Maryland in February of 1972, the Corps began its consideration of the application with the permit finally being issued to the State on November 22, 1976. After initial review of the application, the Corps held a public hearing on August 29, 1972 and in February 1973, the Corps completed its draft environmental impact statement. The initial evaluation of the application occurred in a report dated July 18, 1974 prepared by the District Engineer of the Baltimore District. A second public hearing was held on May 10, 1975 after the Corps had conducted additional

water quality analyses required under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* The Corps' final environmental impact statement was completed in early 1976, this report being required pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Upon completion of the impact statement, the District Engineer for the Baltimore District prepared a report on the application recommending issuance of the permit with the inclusion of certain conditions in the permit. This recommendation was concurred in by the Corps' North Atlantic Division on March 8, 1976 and the final report was sent to the Corps' headquarters in Washington for the final approval. Final approval was given in November 1976 and the State of Maryland was issued a permit for the diked disposal facility under 33 U.S.C. §§ 403 and 1344.

The administrative record of the Corps' consideration of the permit application is described in the Government's Index to the Administrative Record filed with this court. However, the parties have agreed that the entire administrative record need not be filed and the parties have submitted those documents which they feel bear on the issues raised in the motions for summary judgment as exhibits to their motions. The court is at liberty to request that any additional documents be supplied should the court feel the need to examine additional documents in conjunction with the instant motions.

The eleven counts of plaintiffs' complaint cover numerous allegations having to do with the authority of the Corps to issue the permit and the administrative process undertaken by the Corps in determining that the permit should be granted. The claims of plaintiffs can be summarized as follows: Count one asserts that the Corps acted improperly in issuing the permit to the State of Maryland under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, in that the particular project which was the subject of the permit could only be issued under Section 9 of the Act, 33 U.S.C. § 401. Section 9 requires that Congressional

approval of the project be obtained in addition to the issuance of a permit by the Corps. Plaintiffs assert in Counts two through eight that the Corps failed to evaluate adequately the integrity of the proposed construction project, the alternatives to the proposed structure, the probable adverse and cumulative impacts of the structure in the Hart and Miller Islands vicinity, local zoning and permit restrictions affecting the proposed project, and the monetary costs of the permitted project. Plaintiffs allege that the failure to consider these matters adequately is a violation of the National Environmental Policy Act and the Corps' regulations. Counts nine through eleven contain claims that the Corps acted arbitrarily, capriciously and in bad faith with respect to the environmental impact statement and the decision to grant the permit to the State.

I. The Rivers and Harbors Act of 1899

The application of the State of Maryland for a permit to construct the diked disposal area at Hart and Miller Islands was filed and processed by the Corps under Section 10 [1] of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

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[1] Section 10 of the Act provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Plaintiffs contend that the permit can be issued only under the authority of Section 9[2] of the Act, 33 U.S.C. §401, because the permit authorizes the construction of one or more dikes in navigable waters of the United States. In turn, plaintiffs assert that Section 9 requires Congressional authorization of the project and, as this has not been obtained, the permit is void as an overstepping of authority by the Corps. Defendants counter with the assertion that issuance of the permit pursuant to Section 10 of the Act was appropriate as that section does not require Congressional consent for the deposit of fill material or construction of certain structures such as breakwaters, bulkheads and jetties in the navigable waters of the United States. Thus, the primary legal issue raised in the cross motions for summary judgment is whether the Corps has authority to permit the construction by the State of Maryland of a diked spoil disposal facility in navigable waters of the

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[2] Section 9 of the Act provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

United States by its action of issuing the permit on November 22, 1976.

All parties are agreed that the Chesapeake Bay, the body of water in which the proposed construction is to take place, is a navigable body of water. Further, the parties are agreed that the navigable portions of the Bay do not lie wholly within the limits of one state; rather, the Bay is shared by the State of Maryland and the Commonwealth of Virginia. Additionally, defendants have conceded that Congressional authorization of the project pursuant to Section 9 was not sought because of the position that such authorization was not required. It appears that what does remain for resolution on the issue of whether Section 9 is the appropriate section under which the diked disposal facility should be authorized are: (1) the question of whether the proposed facility in this case is a dike within the meaning of Section 9 (or whether portions of the facility come within the classification of a dike), and (2) the question of whether the dike, if one is found to be contemplated, is to be placed "over or in any . . . navigable water of the United States."

The parties have presented many and varied arguments on the interpretations of Section 9 which they seek to have the court adopt. In order to respond to these arguments, the court has attempted to categorize these arguments in the following manner: (1) reported case law on the interpretation of Section 9, (2) history of section 9 and Section 10, and (3) the Corps' past administrative practice with respect to the application of Sections 9 and 10.

The Reported Case Law

Turning first to the cases, the parties are in dispute over the applicability of cases which reach conflicting conclusions in interpreting Section 9 generally and particularly the term "dike." The court has been cited to two district court decisions which appear to give conflicting definitions of the

term "dike." *Citizens Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), *affirmed,* 425 F.2d 97 (2nd Cir. 1970); *Petterson v. Resor,* 331 F.Supp. 1302 (D.C. Oregon 1971), *remanded as moot,* 494 F.2d 124 (9th Cir. 1974).

In *Citizens Committee for the Hudson Valley,* the Corps had issued a permit to the State of New York which permitted a fill operation for the purpose of constructing the Hudson River Expressway. The permit had been issued pursuant to Section 10 of the Rivers and Harbors Act of 1899. The expressway was planned to extend approximately nine miles along the eastern shore of the Hudson River. Some 22,000 feet of the highway were to rest on 9,500,000 cubic yards of fill which would extend at its widest point some 1,300 feet into the river. The district court noted that the main issue between the parties was whether Section 9 should apply to the project, with plaintiffs contending that since the project involved dikes, causeways and bridges to be built in or over navigable waters of the United States, the Corps had exceeded its authority in issuing the permit pursuant to Section 10. In determining whether a dike was involved in the project, the court examined the permit itself, as well as the plans for the project, and found both to contain numerous references to "dikes." The district court also noted that the plans prepared in connection with the securing of bids on the project illustrated and described various types of dikes to be included in the project. Defendants in that case countered with the argument that even if dikes were involved, Section 9 would not apply as the dikes would not have a substantial effect on navigation. Further, defendants argued that Congress meant the term "dike" in the Act of 1899 to be given the meaning stated in Chambers Technical Dictionary, p. 273 (3rd Rev. ed with Supp. 1958) which was as follows: "a wall or embankment of timber, stone, concrete, fascines, or other material, built as a training works for a river so as rigidly to confine flow within definite limits over the length treated." From this

definition, the defendants supported their argument that a dike must substantially affect navigation before it will be one included within the meaning of that term in Section 9. The district court concluded that dikes were contemplated in the project and that said dikes came within the meaning of the term as used in Section 9:

> We hold, based on the evidence presented at trial, that 'dikes,' characterized as such by the defendants, are to be constructed along the western side of the fill and that Congress when it said 'any dike' over or in any navigable river meant exactly that. Therefore, the Corps of Engineers exceeded its statutory authority in issuing the permit which enables the State to commence advertising for bids.
>
> In the absence of any legislative or judicial authority to support the defendants' theory of statutory interpretation we apply the ordinary meaning to the term 'any dike.' Dike is defined as '[a] bank, as of earth, thrown up to form a barrier, line of demarcation or the like * * *.' Webster's New International Dictionary, 2d Ed., p. 730 (1954); 'An embankment for controlling or holding back the waters of the sea or a river.' Random House Dictionary of the English Language, p. 403 (1967). 'Statutes are to be construed by attributing its ordinary meaning to the language used.' . . . Consequently, we hold that if Congress meant to confine its jurisdiction to only those dikes that substantially affect navigation, it would have said so. Since proposed dikes are involved and will be 'over or in' a navigable river of the United States, we leave to Congress, when it decides if it will approve the project, the consideration of the effect of the dikes on navigation. (citation omitted) 302 F.Supp. at 1088-1089.

On appeal, the Second Circuit Court of Appeals briefly discussed the merits of the case and adopted the conclu-

sions of the district court with respect to the definition of the term dike:

> . . . [t]he district court concluded that construction of both a 'dike' and a 'causeway' were contemplated by the State. The court was called upon to construe the meaning of those terms as they were used in § 401 of the Rivers and Harbors Act of 1899, and as they applied in fact to the Expressway plans before it. Having carefully reviewed the pertinent evidence and considered the governing rules of statutory construction, we adopt the conclusion of the district court that the word 'dike' used by the defendants in their permit has the same meaning there as in § 401 of the Act, and that construction of a dike is forbidden by that Section without the consent of Congress. 425 F.2d at 106.

In *Petterson v. Resor, supra,* the district court determined that the approach of the court in *Citizens Committee for the Hudson Valley* of using the common dictionary definition of the term "dike" was inappropriate in view of the legislative history of Sections 9 and 10 and the administrative practice of the Corps. That case involved a permit issued by the Corps under Section 10 for the extension and relocation of an airport runway. Said extension was to occur on a fill to be constructed in the South Slough of the Columbia River. The construction of the fill involved the removal of all or portions of three islands by dredging and the placing of the dredged material in the fill area. The court noted: "These improvements will not affect the main channel or the navigability of the Columbia River which flows between Oregon and Washington. In fact, the improvements will increase the navigability of the river." 331 F.Supp. at 1303. Although the court apparently relied upon the legislative history of Sections 9 and 10, the court does not indicate exactly which portions of the history were relied upon and does not specifically refer to any

particular documents, Congressional or otherwise. The court merely states:

> Here, defendants presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*. This evidence supports the defendants' contention that § 401 requires *Congressional consent for dikes only when they are obstructions to navigation*. . . .
>
> The legislative history shows that Congress enacted the Rivers and Harbors Appropriation Act of 1899, Ch. 425, 30 Stat. 1121, as a comprehensive plan for keeping our interstate waterways clear of unreasonable obstructions and structures. It required approval of the federal government for work on *navigable interstate waterways*. Every structure built in a *navigable waterway* required the approval of the Chief of Engineers and the Secretary of the War (now the Secretary of the Army). In addition, for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation, Congressional consent was required. This distinction was written into the law, apparently because of the belief that Congress could not constitutionally delegate to the Secretary of War or to any other agency the authority to permit an obstruction of a navigable waterway. *United States v. Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1891). (emphasis supplied) 331 F.Supp. at 1306.

Additionally, the court looked to various examples of other projects which had been permitted by the Corps under Section 10 and which were projects involving the extension of airport runways. The court found that the mere designation of a project as a "dike" was not determinative "if the proposed improvement did not obstruct navigation." 331 F.Supp. at 1306.

On appeal, *Petterson* was remanded to the district court to vacate the previous judgment and to enter a judgment of dismissal of the action as moot. 494 F.2d 124 (9th Cir. 1974) Plaintiffs argue that the entry of a judgment of dismissal as moot relegates the opinion of the district court to an advisory status because the term "moot" indicates that the point remains undecided. Because the jurisdiction of the federal courts requires that a case or controversy exist in fact, it has been the practice of the Supreme Court in a case which has become moot pending final decision to remand with directions to dismiss the action. *See United States v. Munsingwear,* 340 U.S. 36 (1950). The rationale of this procedure applies with equal force to a remand from a court of appeals with directions to dismiss and was aptly stated by the Supreme Court as follows:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. 340 U.S. at 40.

Thus, the decision in *Petterson* must be viewed by this court as a preliminary decision which has not undergone the review sought by the side losing the case in the district court. As such, this court will consider the opinion as carrying only advisory weight on the issues presented in the instant action.

The court also notes that if it were to accept the reasoning of the district court's opinion in *Petterson,* that case is clearly distinguishable on the facts as the district court stated that the improvements to the airport in that case in no way obstructed navigation on the Columbia River but rather would enhance such navigation, apparently because all or portions of three small islands in the river were to

be removed by dredging to construct fill for a runway extension. In the present case it cannot be said that the dike and the large impoundment area in the bay created by it will enhance the navigability of the bay.

The court has been cited to an additional case which dealt with the application of Section 9 to a structure deemed to be a dike within the meaning of that section. *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Calif. 1975). In the *Sierra Club* case a canal was to be built which would result in the damning of the river at the point where the canal would cross the river. The court adopted the reasoning of *Citizens Committee for the Hudson Valley* in applying the ordinary meaning of the words "dike" and "dam" and in finding that a structure covered by Section 9 was involved. The court noted:

> Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9. In *Citizens Committee for the Hudson Valley v. Volpe,* . . ., the court held that the word 'dike' should be defined in accordance with its ordinary meaning. The court found that dike meant, *inter alia,* '[a]n embankment for controlling or holding back the waters of the sea or a river.' . . . The Court notes that 'dam' is defined as "a barrier preventing the flow of water" . . . . Hence, even though the closure of Middle River will be caused by a structure denoted as a 'canal', because the structure will have the effect of a 'dam' or 'dike', the Court finds that the Peripheral Canal is the type of structure regulated by Section 9. Because the Peripheral Canal will clearly be 'in' the Middle River, the only issue remaining is whether Section 9 prohibits any dikes or only those dikes which obstruct navigation. Although the legislative intent underlying the enactment of Section 9 may well have been to prohibit unreasonable obstructions to navigable waters, it seems likely that Congress used the word 'any' in Section 9 in

> order to reserve the right to determine whether a given structure created an unreasonable obstruction. Because the Peripheral Canal will obstruct navigation on the Middle River, however, either construction of Section 9 will include the Canal within the section's regulatory prohibitions. (citations omitted) 400 F. Supp. at 626-627.

It would appear that the court in *Sierra Club* recognized the possibility that a two step process would have to be undertaken in a Section 9 inquiry: (1) does the structure fall within the ordinary definition to be given to the term "dam" or "dike", and (2) does this "dam" or "dike" obstruct navigation. The court found the consent of Congress was required because the court considered that either (1) the structure was a dam or dike, or (2) the structure was a dam or dike and was an obstruction to navigation. The court in *Sierra Club* did not make a finding as to whether the structure was an *unreasonable* obstruction to navigation, an inquiry the court thought the statute reserved to the Congress.

To summarize the three cases discussed above, *Citizens Committee for the Hudson Valley* found that Section 9 applies to any structure coming within the ordinary meaning of the word "dike" and left to Congress the determination of whether there was an obstruction to navigation, unreasonable or not. *Petterson* is an advisory view that Congressional consent is required only when a dike is an obstruction to navigation, while *Sierra Club* accepted the premise that the ordinary meaning should be given to the term "dike" and did not decide whether Section 9 applied to *any* dike or only those which constituted an obstruction to navigation, finding that either construction of Section 9 applied in that case as the structure contemplated was a dike and was an obstruction to navigation.

Two decisions of the Supreme Court support the court's view that Congress has specified the structures over which it retains control, that a dike is one such structure, and that the general purpose of Section 9 was to exercise control over obstructions to navigation, leaving to Congress the determination of which obstructions will be allowed and which prohibited. This determination is delegated to the Corps of Engineers as to cases enumerated in the second and third clauses of Section 10 but is reserved to the Congress as to those structures described in Section 9.

Thus, in *Wisconsin v. Illinois,* 278 U.S. 367 (1929), the court speaking through Chief Justice Taft stated:

> Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the class of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . .
>
> * * * *
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> *Id.* at p. 412-413

In *United States v. Arizona,* 295 U.S. 174 (1935), the court dealing with Section 9 stated:

> Subject to an exception with which we have no concern, Sec. 9 of the Act of March 3, 1899 forbids the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. 33 U.S.C. Sec. 401. And Sec. 12 makes violations of Section 9 punishable by fine or imprisonment or both and provides for removal of unauthorized structures. 33 U.S.C. Sec. 406. These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever.
>
> *Id.* at p. 183-184

In the light of this review of cases construing the Act, the court in the present case concludes that it should first determine whether the proposed structure is a dike within the ordinary meaning of the term. If the structure is found to come within this meaning, the court should then consider whether the dike, if constructed, would constitute an obstruction to navigation. If the structure is found to be a dike which is an obstruction to navigation, it then becomes the exclusive province of the Congress to determine whether the obstruction is unreasonable and approval of the project should be denied, or whether the obstruction is reasonable and approval should be granted.

Is the Structure a Dike?

Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D. N.Y. 1969) teaches that the word "dike" is to be given its ordinary meaning in construing Section 9. Dike is defined as "[a] bank, as of earth, thrown up to form a barrier, line of demarcation or the like * * *" Webster's New International Dictionary, 2nd Ed., p. 730 (1954), "An embankment for controlling or holding back the waters of the sea or a river." Random House Dictionary of the English Language, p. 403 (1967).

The State of Maryland in its application for a permit (A.R.D. 11)[3] stated "We request a permit for the construction of a diked disposal area for the dredged spoil to be built as shown on the attached plans in the Chesapeake Bay in the vicinity of Hart and Miller Islands." The permit finally issued on November 22, 1976 (Exhibit 1 to the Complaint) authorizes the State of Maryland to construct "a diked disposal area to contain dredged material on approximately 1,100 acres adjacent to Hart and Miller Islands" in accordance with attached plans and drawings titled "Proposed Dredging and Dike in Chesapeake Bay at Miller and Hart Island." The area plan attached to the permit notes that "4,300,000 cubic yards will be dredged from portions of cross-hatched area by hydraulic dredging and will be deposited around perimeter of disposal area to form the dike"; "during construction of the dike, the rip-rap will be placed in a timely manner to preclude erosion of the dike material"; "in order to shape the dike, dragline method may be used." The project description in the final environmental impact statement prepared by the U.S. Army Engineer District, Baltimore, Maryland refers to the structure as a dike throughout. The communications to and from the Corps of Engineers found in the administrative record with regard to the project are replete with

[3] "A.R.D." refers to Administrative Record Document.

references to the structure as a dike. Since the whole purpose of the structure is to hold back the waters of the bay from intrusion into the area in which the dredged spoil will be placed, the court is satisfied that the structure is a dike within the ordinary meaning of that term.

Is the Dike an Obstruction to Navigation?

The structure of Sections 9 and 10 of the Rivers and Harbors Act of 1899 is not simple. Justice Harlan has stated that their provisions are complex and their legislative history tortuous.[4] Curiously, the word "obstruction" appears only once, in the first clause of Section 10. It appears to the court that the first clause of Section 10 is a transitional clause, and applies not only to Section 10, but to Section 9.

This conclusion stems from a review of the principal clauses in the two sections.

First Section 9, 33 U.S.C. Section 401. makes it unlawful to construct any bridge, dam, dike, or causeway without the consent of Congress and the approval of the Chief of Engineers and the Secretary of War.

Second A bridge, dam, dike or causeway under Section 9 may be built under authority of a state legislature where the waterway involved lies wholly within the limits of the state, provided the location and plans are approved by the Chief of Engineers and the Secretary of War.

Third Clause 1 of Section 10, 33 U.S.C. § 403 provides "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any waters of the United States is hereby prohibited."

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[4] Dissenting in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 493.

Fourth Clause 2 of Section 10 makes it unlawful to build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

Fifth Clause 3 of Section 10 makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War.

What emerges from these clauses seems to be this:

1. Any obstruction to navigable capacity not authorized by Congress is prohibited.
2. Bridges, dams, dikes and causeways are obstructions to navigation where the consent of Congress is absolutely required if the navigable water extends through more than one state.
3. Congress has delegated its consent function in the case of a bridge, dam, dike or causeway obstructing a navigable water wholly within a single state to the Chief of Engineers and the Secretary of War if the concerned State has authorized it.
4. Congress has delegated its consent function as to any of the obstructions enumerated in Clauses 2 and 3 of Section 10 to the Chief of Engineers and the Secretary of War.

The Supreme Court has ruled that the "any obstruction" language of Section 10, Clause 1 is not limited either to the specific structures enumerated in Section 9 or to the specific structures listed in Clauses 2 and 3 of Section 10.

Justice Douglas in *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903, rehearing denied, 363 U.S. 858, 80 S.Ct. 1605, 4 L.Ed.2d 1739, observed that the "any obstruction" language of Section 10 must be given a broad sweep, embracing not only the prior enumeration of obstructions in Section 9, the structures listed in Clauses 2 and 3 of Section 10, but also diminution of the navigable capacity of a waterway by means not included in any listing of structures in Section 9 or Section 10. In the *Republic* case, he held the concept of "obstruction" was therefore broad enough to encompass the discharge into a navigable river of industrial solids which reduce the depth of the channel.

In the present case, we are dealing with a massive structure two square miles in size in the Chesapeake Bay, a mile off the shore. It would eventually accommodate 52 million cubic yards of spoil. According to the environmental impact statement itself,[5] "it is undeniable that boating will be precluded in the space occupied by the containment area. On the Bay side boating will be moved further out into the Bay." The court finds that such a structure in the waters of the bay would be an obstruction to navigation. Whether or not it is an unreasonable obstruction is a matter that should be determined by the Congress under 33 U.S.C. § 401.

The Reach of the Statute

Defendants contend that 33 U.S.C. § 401 is limited in its application to those situations where a dam or dike is constructed *across* a navigable water of the United States, thereby creating an obstacle to navigation of the waterbody. 33 U.S.C. § 403 is said on the other hand to apply to all other structures to be constructed in navigable waters. From this it is argued that since Maryland's diked disposal facility, although called a "dike", does not extend

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[5] EIS, p. 90.

completely across the Chesapeake Bay, it therefore is subject to regulation under 33 U.S.C. § 403, rather than 33 U.S.C. § 401. Indeed, the Corps has been careful to announce this distinction in the latest regulations promulgated on July 19, 1977, after the filing of the present suit. Those regulations now define the term "dike" to mean:

> an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.
>
> 33 C.F.R. 321.2

It is said by defendant Corps that the new regulation merely crystalizes what has been a uniform administrative practice; namely, to treat structures which completely obstruct a waterway under Section 401 and all others under Section 403. It is urged further that where an agency has interpreted a statute which it has been charged to administer, the court should grant that agency's construction considerable deference.

As to these contentions, the court observes that water cannot rise higher than its source—in this instance neither administrative practice nor the promulgation of regulations can create jurisdiction where none exists. As the Supreme Court put it in *Federal Maritime Commission v. Sea Train Line,* 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d, at 620:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. *See, e.g., N.L.R.B. v. Hearst Publications, Inc.,* 322 U.S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.
>
> *Id.* at 745.

In the present case, the newly promulgated definition of the term "dike" was not contained in the Corps' regulations at the time the Hart-Miller permit was being processed and issued. (33 C.F.R. 209.125, 1976 Ed.). The regulation cannot be definition expand the reach of the statute. The statute does not say the consent of Congress is required only when the bridge, dam or dike completely spans or completely obstructs a waterway. The statute in relevant part expressly states:

> It shall not be lawful to construct . . . any bridge, dam, dike or causeway over or *in* any . . . navigable water . . . until the consent of Congress to the building of such structures shall have been obtained. (Emphasis supplied)

The language is "over or in" any navigable water—not "completely spans."

It is significant that in the case which is closest to this case on its facts—*Citizens Committee for the Hudson Valley v. Volpe, supra*—the dike in issue there extended north along the east side of the Hudson River, containing fill to support a highway extension. It did not in any fashion "completely span" the Hudson River or completely obstruct waterborne commerce. The court found it unnecessary to consider the effect of the dike on navigation—a task reserved to the Congress under the statute. However, if such consideration were necessary, the court noted that the dike would affect the flow of the river by preventing erosion of the fill back to a natural shoreline (302 F.Supp. 1089). This same reasoning would be applicable to the Hart-Miller Dike, which involves over five times as much fill as the Hudson River Project.

The Corps argues that because there have been instances where it has interpreted the statute to give it control over dike structures which do not completely obstruct navigation, and Congress has not acted to reverse the Corps ac-

tion, Congress must be considered to have tacitly ratified the Corps' administrative interpretation of the statute. Disproving this argument is the fact that when necessary Congress has specifically exempted diked disposal areas from the application of Section 401, thus indicating either that Congress is not aware of or does not accept the Corps' interpretation of Section 401. In this connection, reference is made to the Rivers and Harbors Act of 1970, Public Law 91-611, December 31, 1970, wherein the Congress, in a section of the Act dealing only with the Great Lakes and their connecting channels, specifically provided:

> Sec. 123(a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain, subject to the provisions of subsection (c), contained spoil disposal facilities of sufficient capacity for a period not to exceed ten years, to meet the requirements of this section. Before establishing each such facility, the Secretary of the Army shall obtain the concurrence of appropriate local governments and shall consider the views and recommendations of the Administrator of the Environmental Protection Agency and shall comply with requirements of Section 21 of the Federal Water Pollution Control Act, and of the National Environmental Policy Act of 1969. *Section 9 of the River and Harbor Act of 1899 shall not apply to any facility authorized by this section.*

Here is a clear indication of Congress specifically waiving its prerogative under 33 U.S.C. § 401 to approve the very type of facility involved in the present case. If, as the Corps contends, the Congress had tacitly ratified the administrative interpretation argued for in the present case, there would have been no need to spell out a specific exemption in the Rivers and Harbors Act of 1970, Public Law 91-611. It is to be noted Public Law 91-611 is the same Act cited by the Corps as authorizing funds to deepen

Baltimore Harbor and its access channels to a depth of 50 feet, conditioned upon the requirement that the State of Maryland provide disposal sites for the dredged spoil.

Conclusion

While the court is keenly aware of the problems associated with open water dumping of dredge spoil, and of the need to deepen Baltimore Harbor and its access channels, the statute mandates Congressional approval of the project before it can be undertaken. The court, therefore, holds that in issuing a permit to the State of Maryland under 33 U.S.C. § 403, the Corps of Engineers exceeded its authority. On the one issue dealt with here—the legality *vel non* of the permit to construct the diked dredge spoil containment area at Hart and Miller Islands—the court hereby grants the plaintiff's motion for summary judgment and denies the motions for summary judgment filed by the defendants. The court expresses no view on the other issues raised in the cross motions for summary judgment.

/s/ Herbert L. Murray
United States District Judge

Filed October 20, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES, et al.

MEMORANDUM AND ORDER

On October 20, 1978 the court issued a memorandum and order in this case which granted the plaintiffs' motion for summary judgment and denied the defendants' motions for summary judgment. The court after careful consideration of the substantial number of documents, memoranda and other materials submitted in this case, as well as the arguments of counsel, determined that the Corps of Engineers had exceeded its authority in issuing a permit to the State of Maryland for the construction of a diked disposal area in the Chesapeake Bay.

Subsequent to the announcement of the court's decision, the Steamship Trade Association of Baltimore, Inc., an intervening defendant, filed a motion to alter judgment and/or for reconsideration and for rehearing, and the State of Maryland, a defendant, filed a motion for clarification, reconsideration and reargument in which the Corps of Engineers of the United States, also a defendant, joined.

In connection with these motions, referred to in this opinion as motions for reconsideration, the court has again received several memoranda and the parties have directed the court's attention to a variety of supplementary materials. A hearing on the motions for reconsideration was held on November 17, 1978, and after giving considerable thought to the materials submitted in connection with those motions and to the comments of counsel pertaining thereto,

it is the opinion of the court that the defendants' motions must be denied.

The defendants have raised a number of objections to the decision of the court granting plaintiffs' motion for summary judgment. Many of those objections can be categorized as continuing attempts to pursue matters which previously have been fully litigated and were thoroughly considered by the court in reaching its original determination. Foremost among the arguments upon which the defendants continue to rely is the vigorously asserted proposition that the decision of the court should be controlled by the Corps of Engineers' interpretation of Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, as reflected in the practice of the Corps and in statements of Corps officials.

The argument that courts should defer to administrative construction of a statute is frequently made in cases involving activities of government agencies or administrators. Where the mandate of the statute is clearly contrary to its administrative interpretation, it is the duty of the court to reject that interpretation. *S.E.C. v. Sloan,* 436 U.S. 103, —— L.Ed. —— (May 16, 1978); *Adamo Wrecking Co. v. U.S.,* 434 U.S. 275, —— L.Ed. —— (Jan. 10, 1978).

Before the Supreme Court in the case of *S.E.C. v. Sloan, supra,* was a longstanding agency interpretation of Section 12(k) of the Securities and Exchange Act of 1934. Although the Corps' allegation that its interpretation of Section 9 of the Rivers and Harbors Act of 1899 is longstanding is not altogether clear to the court in light of the promulgation of regulations in 1977 limiting the structures governed by Section 9 to those structures which go "across" waterways, 33 C.F.R. 321.2, the following language from the Supreme Court opinion in *Sloan* is instructive:

> Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our re-

sponsibility to determine whether that practice is consistent with the agency's statutory authority.

> 'The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *NLRB v. Hearst Publications,* 322 U.S. 111, 131; *Unemployment Commission v. Aragon,* 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S. 278, 291.' *Volkswagenwerk v. Federal Maritime Comm'n,* 390 U.S. 261, 292 (1968).

And this is just such a case—the construction placed on the statute by the Commission, though of long-standing, is, for the reasons given in Part III-A of this opinion, inconsistent with the statutory mandate. We explicitly contemplated just this situation in *Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-746 (1973), where we said:

> 'But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. . . . This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.'

And our clear duty in such a situation is to reject the administrative interpretation of the statute. 436 U.S. at 118, 119.

Section 9 of the Act requires congressional consent for the construction of certain structures "over or in" specified waterways or "other navigable water of the United States." 33 U.S.C. § 401. The Corps contends that it has uniformly interpreted Section 9 to apply only to those structures which completely span or go across a waterway. That interpretation of Section 9, which defendants urge the court to adopt, differs significantly from the actual language of the statute and would read the word "in" out of the Act. When the Congress said construction of "any dike" "over or in" any navigable water is prohibited until the consent of Congress to the building of such structure shall have been obtained, it meant exactly what it said. For that reason, the Corps of Engineers' interpretation of Section 9 of the Rivers and Harbors Act of 1899 was and remains rejected by the court. *Compare Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (S.D. N.Y. 1969), *affirmed*, 425 F.2d 97 (2d Cir. 1970) (Determining a diked fill built along the bank of the Hudson River to be "in" the river); *with Petterson v. Resor*, 331 F. Supp. 1302 (D. Ore. 1971), *remanded and vacated as moot*, 494 F.2d 124 (9th Cir. 1974), (Drawing no distinction between structures "in" and those "across" waterways); and *Sierra Club v. Morton*, 400 F.Supp. 610 (N.D. Calif. 1975) (Characterizing the project involved as "in" the particular waterway under consideration).

Given the frequent attention which Congress has devoted to the Rivers and Harbors Act of 1899, reflected by at least eleven separate public laws enacted in the past twenty-two years either amending the Act or containing authorizations under it, it is apparent that Congress is not unaware of either the Act or its specific provisions. In Section 123 of the legislation authorizing the Baltimore Harbor and Channels, Maryland-Virginia Project, the project which has occasioned the efforts of the Corps of Engineers at issue in this case, P.L. 91-611, enacted Dec. 31, 1970, Congress specifically exempts contained spoil disposal facilities in the

Great Lakes from Section 9 of the Rivers and Harbors Act of 1899. 84 *Statutes at Large* at 1823 (1971). The fact that Congress felt compelled to specifically exempt those facilities indicates that Congress either is not cognizant of or does not accept the Corps' interpretation of Section 9 which limits it to structures "across" a waterway. The court has not been advised of a similar exemption applicable to the Hart and Miller Islands facility; and, it most certainly is not the function of the court either to create such an exemption or to rewrite the statute.

The defendants have directed the attention of the court to the case of *Citizens Committee for Environmental Protection, et al. v. U.S. Coast Guard, et al.*, 456 F.Supp. 101 (1978), a recent decision by Chief Judge Barlow of the United States District Court for the District of New Jersey. It is suggested by the defendants that the New Jersey case merits a reconsideration by this court of its decision to grant plaintiff's motion for summary judgment. Without taking issue with the decision of Chief Judge Barlow, concerning a project which appears to differ significantly from the one involved in this litigation, the court notes that Chief Judge Barlow principally relied on the case of *Petterson v. Resor,* 331 F.Supp. 1302 (D. Ore. 1971) *remanded and vacated as moot,* 494 F.2d 124 (9th Cir. 1974), and for reasons contained in its memorandum and order, this court views that case as a decision which is entitled to advisory weight only on the issues presented here.

The defendants have persistently reminded the court that the permit, which the court has determined was issued improperly, was obtained under both 33 U.S.C. § 403, governing construction work in navigable waters of the United States, and 33 U.S.C. § 1344, governing the discharge of fill in those waters. The court has encountered considerable difficulty in attempting to ascertain the significance attached to that fact by the defendants. It has not been

asserted that the issuance of a permit under 33 U.S.C. § 1344 obviates the need for a permit under 33 U.S.C. § 401. The futility of such a claim is exposed when consideration is given to the facts that the two provisions apply to completely different, though potentially related, activities and nothing in the wording of 33 U.S.C. § 1344 or its legislative history can be read to indicate that compliance with 33 U.S.C. § 401 is not required or that § 401 has been repealed by implication.

The court is, as stated in its previous ruling, keenly aware of the problems associated with open water dumping and of the need to deepen Baltimore Harbor and its access channels. Yet that awareness does not and cannot relieve the defendants of the requirement, mandated by statute, of congressional consent to the Hart and Miller Islands diked disposal project. It is entirely consistent with the idea behind our form of government that the final decision as to whether a major structure in a navigable waterway running through two or more states constitutes an unreasonable obstruction should be reserved for the elected representatives of the people rather than be determined by an administrative agency.

For the reasons previously stated, the information and arguments presented by defendants in support of their motions to reconsider do not justify either an alteration of the court's decision granting the plaintiffs' motion for summary judgment or any other form of post judgment relief. Therefore, it is this 22nd day of November, 1978, by the United States District Court for the District of Maryland,

ORDERED:

that the motions for reconsideration be, and the same hereby are, *Denied.*

/s/ HERBERT L. MURRAY
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1911

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees,

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Defendants,

and

STATE OF MARYLAND, Ex Rel,
FRANCIS B. BURCH, Attorney General,

Appellant,

and

STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.,

Intervening Defendant,

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1912

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Defendants

and

STATE OF MARYLAND, Ex Rel,
FRANCIS B. BURCH, Attorney General,

Intervening Defendant

and

STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.,

Appellant

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE, II
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1037

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., a Maryland Corporation; HONORABLE CLARENCE LONG, M.C.; HONORABLE NORMAN R. STONE; MARYLAND WILDLIFE FEDERATION, INC., a Maryland Corporation; JOHN HENDERSON; HOWARD SAPPINGTON; GEORGE WOHLLEBEN; ROBERT SCOTT; MARGARET CALDWELL; CHARLES JUSTICE,

Appellees

v.

THE CORPS OF ENGINEERS OF THE UNITED STATES ARMY; HONORABLE CLIFFORD L. ALEXANDER, Secretary of the Army; LT. GENERAL JOHN W. MORRIS, Chief of Engineers of the United States Army; COL. G. K. WITHERS, District Engineer, Baltimore District, United States Army Corps of Engineers,

Appellants

and

STATE OF MARYLAND, EX REL, FRANCIS B. BURCH, Attorney General, Steamship Trade Association of Baltimore, Inc.,

Intervening Defendant

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this case, be, and the same is hereby, reversed.

FILED MAY 28, 1980

U.S. COURT OF APPEAL, FOURTH CIRCUIT

/s/ WILLIAM K. SLATE, II
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-973

HART AND MILLER ISLANDS AREA
ENVIRONMENTAL GROUP, INC., et al.

v.

THE CORPS OF ENGINEERS OF
THE UNITED STATES, et al.

ORDER

The court having determined for the reasons set forth in its opinion filed in this case on October 20, 1978 that the Corps of Engineers exceeded its authority in issuing on November 22, 1976 a permit to the State of Maryland to construct a diked dredge spoil containment area at Hart and Miller Islands in the Chesapeake Bay without having first obtained the consent of Congress to the building of such structure as required by Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 401, the court having therefore found said permit to be void and of no effect; the court hereby expressly determines that there is no just reason for delay and expressly directs that judgment be entered pursuant to Rule 54(b) on fewer than all of the claims of the plaintiffs; now therefore it is this 24th day of October, 1978, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of plaintiffs for summary judgment be, and the same hereby is, *Granted* as to Count One of the Complaint;

(2) that the motions of defendants for summary judgment be, and the same hereby are, *Denied* as to Count One of the Complaint;

(3) the court at this time expresses no view as to the points raised in the motions for summary judgment as to Counts Two through Eleven of the Complaint; and

(4) that the Clerk of the Court mail copies of this Order to counsel for the parties.

/s/ HERBERT L. MURRAY
United States District Judge

STATUTES

SECTION 2 OF THE RIVERS AND HARBORS ACT OF 1888 (25 Stat. 423; 33 U.S.C. § 500)

That whenever complaint shall be made to the Secretary of War that by reason of the placing in any navigable waters of the United States of any bridge pier or abutment, the current of such waters has been so deflected from its natural course as to cause by producing caving of banks or otherwise serious damage or danger to property, it shall be his duty to make inquiry, and if it shall be ascertained that the complaint is well founded, he shall cause the owners or persons operating such bridge to repair such damage or prevent such danger to property by such means as he shall indicate and within such time as he may name, and in default thereof the owners or persons operating such bridge shall be liable in any court of competent jurisdiction to the persons injured in a sum double the amount of said injury: *Provided, however,* That nothing herein contained shall be construed so as to affect any rights of action which may exist at the time of the passage of this act.

SECTION 4 OF THE RIVERS AND HARBORS ACT OF 1890 (26 Stat. 453)

That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable water-ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steam boats, or other watercraft, it shall be the duty of the said

Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

SECTION 5 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 453)

That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises such persons, corporation or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

SECTION 7 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 454)

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided,* That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1890 (25 Stat. 454)

That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters,

in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

SECTION 6 OF THE RIVERS AND HARBORS ACT OF 1894 (27 Stat. 363)

That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea wall, bulkhead,

jetty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks; any and every such act is made a misdemeanor, and every person knowingly engaged in or who shall knowingly aid, abet, authorize, or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

SECTION 9 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1151; 33 U.S.C. § 401)

That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after comple-

tion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1151; 33 U.S.C. § 403)

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

SECTION 18 OF THE RIVERS AND HARBORS ACT OF 1899 (30 Stat. 1153; 33 U.S.C. § 502)

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steam-

boats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.

Supreme Court, U. S.
FILED
OCT 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF MARYLAND IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that consent of Congress is not required, pursuant to Section 9 of the Rivers and Harbors Act of 1899, for the construction of the spoil disposal facility at Hart and Miller Islands in the Chesapeake Bay.

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No. 80-273

IN THE

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OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

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v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF MARYLAND IN OPPOSITION

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 28, 1980. The Petition for Writ of Certiorari was filed August 22, 1980. The time for filing this Brief in Opposition has been extended until October 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. § 401 (hereinafter the "Act" or the "1899 Act"), provides in part:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any . . . navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army . . . ."

Section 10 of the Act, 33 U.S.C. § 403, provides in part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to begining the same."

The full text of these sections, together with the text of certain predecessor statutes, appears in the Appendix to the Petition for Writ of Certiorari ("App.").

STATEMENT

The Army Corps of Engineers ("Corps") issued a permit, pursuant to Section 10 of the 1899 Act, for the construction of a certain spoil disposal facility in the Chesapeake

Bay. Respondents contend that the permit is valid. Petitioners contend it is not valid on the theory that the project is a "dike" within the meaning of Section 9 of the Act.

1. Factual Background

The State of Maryland applied to the Corps on February 23, 1972, for a permit to construct a containment area adjacent to Hart and Miller Islands in the Chesapeake Bay. After public hearings in 1972 and 1975, as well as consideration of an environmental impact statement, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, et seq., on November 22, 1976, the Corps issued the permit to construct a spoil disposal facility for the containment of dredged materials.

Additionally, extensive public and private studies addressed the structural soundness and environmental acceptability of the project. Studies were performed on sedimentation and the erosion process by the Maryland Geological Survey. A wetlands productivity investigation was undertaken by the Maryland Department of Natural Resources. An analysis of the use of dredged spoil for aggregate was performed by the Maryland Environmental Service. A State-funded Peer Review Study critiqued the project design. The Corps carefully considered all matters raised by the studies and determined that the issuance of the permit was appropriate.

When completed, the structure at Hart and Miller Islands will extend no more than 4700 feet into the Bay in an area where the Bay is seven miles wide (App. 3a). While the Chesapeake Bay has 4300 square miles of water surface, the proposed structure will occupy two square miles. Plans call for substantial expenditure of state funds for the subsequent development of the facility into a major State park.

The prompt construction of the facility will allow the Port of Baltimore to maintain its authorized channel depth of 42 feet and further accommodate material dredged during the authorized deepening of the channel to 50 feet.[1] There are substantial economic benefits to be gained for the citizens of Maryland and this project has been determined as essential for the development of the Port of Baltimore.

2. The Permit

The permit for this project was issued pursuant to Section 10 of the 1899 Act. Section 9 of the 1899 Act requires the consent of both Congress and the Corps for construction of certain types of structures in or over navigable waters, including "any bridge, dam, dike or causeway over or in any" such waters. Section 10 requires only Corps approval (delegated from the Secretary of the Army) for structures in navigable waters such as wharves, piers, etc., which do not completely span the waterway. The permit was issued pursuant to Section 10 of the 1899 Act because the proposed structure would not completely span the waterway.

3. Proceedings at the District Court

On June 30, 1977, seven months after the issuance of the permit, Petitioners brought this eleven count suit in the United States District Court for the District of Maryland. It challenged various actions of the Corps of Engineers in connection with the Hart and Miller Islands project. Petitioners sought, in Count One, a declaration that the issuance of the permit was unlawful and void for lack of consent of Congress, which they claimed was required on the theory that this project was subject to Section 9 of the 1899 Act.

[1] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 101, 84 Stat. 1818 (1970).

Cross-motions for summary judgment were filed as to all counts. The district court (Murray, J.) granted summary judgment for Petitioners on Count One pursuant to Rule 54. It declared that the Corps of Engineers exceeded its authority by issuing the permit without having obtained the consent of Congress (App. 23a-60a). The cross-motions for summary judgment on the remaining ten counts have yet to be ruled upon by the district court.

4. Decision of the Fourth Circuit

On May 28, 1980, the United States Court of Appeals for the Fourth Circuit (Widener and Hall, JJ., and Warriner, D.J.) reversed (App. 1a-21a). The court held that Section 9 applied only to structures which completely span a navigable body of water (App. 20a).

The court of appeals did not confine its interpretation of the meaning of the term "dike" to the dictionary meaning because it found that Section 9 of the Act was ambiguous (App. 7a-14a). It drew that conclusion from this Court's statement in *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929), that the interrelationship of various segments of Section 10 of the Act was ambiguous and found that such ambiguity applied to Section 9 as well. Given this ambiguity in statutory language, the court of appeals construed the term "dike" in light of both the extensive legislative history before it and the Corps' long-standing and consistent administrative practice.

The court of appeals analyzed the then prevailing precedents of *United States v. Keokuk & H. Bridge Co.,* 45 F. 178 (S.D. Iowa 1890) and *United States v. Rider,* 50 F. 406 (S.D. Ohio 1891). This analysis indicated that Section 9 may well have been intended to require Congressional approval only where agency approval was perceived to be an unconstitutional delegation of legislative power, *i.e.,* for bridges, causeways, dikes, or dams, that completely span a

navigable waterway (App. 14a).[2] In further support of its interpretation, the Fourth Circuit relied on a Corps lecture by the drafter of the 1899 Act which was submitted to Congress in connection with subsequent legislation. The drafter stated that Section 9 applies to structures which extend entirely across a waterway, whereas Section 10 relates to structures which project into, rather than cross, bodies of water (App. 15a-16a).

The Fourth Circuit found that this interpretation of Sections 9 and 10 described by the Act's drafter has been consistently applied over a period of 80 years (App. 17a). Affidavits from Corps officials provided uncontradicted evidence that this interpretation has been applied to numerous projects (App. 16a).[3] Congressional testimony of

[2] In 1890 Congress enacted the first general legislation subjecting obstructions in navigable waters to federal scrutiny. Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454, prohibited the construction of wharves, piers, dolphins, booms, dams, weirs, breakwaters, bulkheads, jetties, and "structures of any kind" outside established harbor lines without permission from the Secretary of War. Section 7 also permitted construction, pursuant to state legislative authority, of bridges, bridge draws, bridge piers and abutments, causeways, and "other works" over or in navigable waters of the United States, provided the plans were later approved by the Secretary of War. Thus both the approval of the Secretary of War and the state was required for construction of bridges, causeways, etc. over or in navigable waters. State authorization powers were further curtailed by a proviso to Section 7 which expressly limited them to structures over or in navigable waters wholly within the limits of a single state. This proviso effectively required the approval of the Secretary of War for all structures over or in navigable waters touching more than one state.

[3] The assertion by Petitioners in footnote 24 of their brief that these affidavits "primarily demonstrate Corps approval of dikes within harbor lines, or in bodies of navigable water which touch only one state" ignores geographic fact. A cursory examination of the DeSista affidavit shows Corps approval over the years for numerous projects of massive size in navigable waters that touch the boundaries of more than one state, *i.e.*, over fifteen miles of earth and rock fill in the Columbia River (Oregon and

the Secretary of War further confirmed the long-standing interpretation that Section 10 authorized the Corps to permit or refuse to permit any obstruction to navigation, except the class of structures which extend clear across any navigable waterway (App. 16a).

While Corps regulations promulgated prior to 1977 contained no explicit definition of "dike," published regulations giving effect to the Corps' interpretation are found in the Code of Federal Regulations since its inception. See, *e.g.*, 33 C.F.R. 209.120 (1948); 33 C.F.R. 209.120(b)(1)(a) (1969); 33 C.F.R. 209.120 (1974). This material demonstrates a long-standing administrative interpretation sufficiently weighty to clarify the ambiguity in Section 9.

Finally, the correctness of the Corps' interpretation was recently verified by Congress. During Senate consideration of the Federal Water Pollution Control Act Amendments of 1972, Senator Muskie remarked that Congress "was uniquely aware of the process by which which the dredge and fill permits are presently handled . . . ." 118 Cong. Rec. 33699 (1972) (App. 19a). The Fourth Circuit accepted the Corps' interpretation because, obviously, Congress understood this process, which included the Corps' long-standing interpretation of Sections 9 and 10, and deliberately declined to interfere with it (App. 20a).

The Fourth Circuit concluded that the Hart and Miller Islands project was not a "dike" under Section 9 requiring

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Washington), a dike and fill extending discontinuously for 19 miles along the Columbia River for a low elevation highway, a random stone fill for two miles along the banks of the Ohio River and a park extension by creating fill of 500 feet by 6,000 feet in Lake Erie. Indeed it may be argued that Congress was aware of and tacitly approved of the long-standing Corps practice by virtue of the size and notoriety of certain projects approved pursuant to Section 10 which do not completely span a waterway and were designated as "dikes," "causeways," "roadways," or similar characterizations.

consent of Congress since it would not completely span a navigable waterway.

ARGUMENT

Petitioners principally assert that the permit for construction of the project is invalid for lack of consent of Congress. The decision of the court of appeals correctly rejected that assertion. Petitioners' allegation that a conflict exists between circuits is without merit. Likewise, their allegation that absent a review by this Court public funds may be wasted, is purely speculative. Review by this Court is not warranted.

I.

THE ALLEGED CONFLICT BETWEEN THE FOURTH AND SECOND CIRCUITS DOES NOT JUSTIFY REVIEW BY THIS COURT

Petitioners base their assertion of a conflict in the circuits on a comparison of the Fourth Circuit's decision here with the Second Circuit's decision in *Citizens Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083 (S.D. N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir. 1970), cert. denied sub nom. *Parker v. Citizens Comm. for Hudson Valley,* 400 U.S. 949 (1970). That case involved a permit to construct an expressway along the east bank of the Hudson River. There, the district court held that Congressional consent was necessary for construction of a rock dike parallel to the shore of the river, designed to contain fill and thus create new land within the confines of the river to support the highway. In the absence of the legislative history of the Act in the record before it, the court relied on dictionary definitions, and found that the subject structure was a "dike," as the term is used in Section 9. 302 F. Supp., at 1088-891. The Second Circuit affirmed, in an opinion primarily concerned with questions of standing and jurisdiction, with only a cursory mention of the interpretation of the respective coverage of Sections 9 and 10.

Of critical importance here is the fact that the Second Circuit did not have before it, in 1970, the benefit of the hearings on the Federal Water Pollution Control Act Amendments of 1972 (*supra*, at 7). In any event, the record before the Court in *Hudson Valley* was deficient because it did not contain the wealth of legislative and administrative materials which were necessary to a proper analysis of the issue and which were presented to the Fourth Circuit in this case. Given the summary treatment of the issue by the Second Circuit and the absence of a record necessary for proper analysis by it, the alleged conflict between the two circuits is more theoretical than real.

To shore up their argument for granting certiorari, Petitioners eventually shift away from the alleged conflict between the Second Circuit and the Fourth Circuit. Petitioners next claim that the alleged conflict between the two circuits has generated conflicting decisions in three lower courts. As detailed by the Fourth Circuit however, these lower court decisions establish a judicial trend which disregards the Second Circuit's cursory interpretation of Section 9. The result is that ten years after its decision in *Hudson Valley,* the Second Circuit remains isolated in its view of the meaning of Section 9. Contrary to Petitioners' argument, the consistent failure of lower courts to follow the Second Circuit makes review by this Court unjustified at this time.

First, in *Petterson v. Resor,* 331 F. Supp. 1302 (D. Or. 1971), remanded as moot sub nom. *Citizens Committee for the Columbia River v. Callaway,* 494 F.2d 124 (9th Cir. 1974), the court had the benefit of legislative and administrative history materials.[4] The project at issue involved

[4] There is an error at 9a of the Petitioners' Appendix. The text of the Fourth Circuit's opinion states that "In *Petterson v. Resor* . . . the court did have the benefit of legislative and administrative history materials . . . ." The Appendix misquotes the

depositing fill, surrounded by a retention structure, in the South Slough of the Columbia River in order to support an airport runway extension. The district court determined that the project did not involve "dikes" (within the meaning of Section 9) because Congressional consent was required only "for these structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation." 331 F. Supp. 1302, 1306. The Court held that the runway extension did not obstruct navigation and thus Congressional approval was not required.

Second, in *Sierra Club v. Morton,* 400 F. Supp. 610 (N.D. Cal. 1975), a 42 mile canal was in dispute. Because the structure, labeled a canal, would cross and completely dam and obstruct a navigable river, the court determined that it was a "dam" or "dike" within the meaning of Section 9. 400 F. Supp. 610, 626-27. This case was appealed but the question of the respective coverage of Sections 9 and 10 did not survive the court of appeals. *Sierra Club v. Morton,* 610 F.2d 581 (9th Cir. 1979).[5] In any event, while the district court professed to rely on *Hudson Valley,* its holding is consistent with *Petterson.*

Third, in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp. 101 (D. N.J. 1978) the court considered the application of the 1899 Act to the placement of fill behind retaining walls in the

opinion by printing that "In *Petterson v. Resor* . . . the court did *not* have the benefit of legislative and administrative history materials . . ." (Emphasis added).

[5] Out of this single appellate decision three petitions for certiorari have been generated. As was true with the case before the Ninth Circuit, these three petitions do not present the question of the respective coverage of Sections 9 and 10. *State of California v. Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency v. Sierra Club* (No. 79-1502, filed Mar. 17, 1980); and *Sierra Club v. Andrus* (No. 79-1625, filed Apr. 16, 1980).

Raritan River for the purpose of supporting a highway extension. Rejecting the plaintiffs' argument that the fill constituted a "dam" or "dike," the court determined that the critical question was whether the activity constituted an unreasonable obstruction to navigation. Since the impact of the project on actual navigation was negligible, the court held the Corps was justified in determining that Section 9 did not apply, and that a Section 10 permit was sufficient. 456 F. Supp. at 113-14.

Instead of the alleged conflicting decisions in the lower courts, it appears that the same conclusion reached by the Fourth Circuit has been reached elsewhere.[6] For example, this same conclusion was recently reached by the district court in *Sierra Club v. Leslie Salt Co.*, No. C-72-561-WTS (N.D. Cal. Jan. 15, 1980), appeal docketed, No. 80-4095 (9th Cir. March 3, 1980). In that opinion, which is attached as an appendix hereto ("R. App."), the term "dike" in Section 9 was interpreted as meaning a structure which completely spans a navigable waterway and which obstructs navigation (R. App. 11a).

The alleged conflict between the Second and Fourth Circuits does not justify review by this Court at this time. Arguably, review by this Court might have been justified ten years ago in order to correct the erroneous interpretation put forward in *Hudson Valley*. However, the cases decided in the last ten years demonstrate that *Hudson Valley* has not been followed and that there is no substantial conflict between the circuits to justify review at this time. Indeed, were the Second Circuit now to focus

[6] As further noted by the Fourth Circuit in its exhaustive analysis (App. 10a, n. 6), other courts, without addressing the meaning of "dike," have applied Section 10 where the structure did not completely span the waterway. *United States v. Bailey*, 467 F. Supp. 925 (E.D. Ark. 1979); *United States v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978); *Magno v. Corros*, 439 F. Supp. 592 (D.S.C. 1977); *Environmental Defense Fund v. Alexander*, 467 F. Supp. 885 (N.D. Miss. 1979).

its attention on this issue with the benefit of a complete record and against the background of the hearings on the Federal Water Pollution Control Act Amendments of 1972, there seems little doubt that it would reach the same conclusion as the Fourth Circuit.

II.

THIS CASE DOES NOT PRESENT A QUESTION OF LAW WHICH JUSTIFIES REVIEW BY THIS COURT

The project at issue is one of many which have been undertaken nationwide over the past ten years and longer without Congressional approval. The degree to which confined disposal facilities in navigable waterways, such as the Hart and Miller Islands project, will be utilized in the future is uncertain. While Petitioners mention that substantial funds have been and presumably will be spent on the removal of dredged materials, there is no evidence as to how much, if any, of the dredged materials will be disposed of in containment areas within navigable waterways. (Pet. 14).

Despite Petitioners' contention, the decision below is not plainly wrong. Indeed, we submit that it is plainly correct. The assertion by Petitioners that absent review by this Court at this time millions of dollars of federal and state funds will be wasted is sheer speculation (Pet. 14). This assertion is one which could be made in virtually every case where this Court is asked to review the correctness of government spending. As recently observed in the *Leslie Salt* case, it would be unacceptable for any court to conclude that the failure to obtain Congressional approval would somehow retroactively render illegal those facilities which were already permitted by the Corps under Section 10 (R. App. 14a).

Petitioners incorrectly assert that the Fourth Circuit sought to impermissably enlarge the Corps' jurisdiction. To support the assertion, the Petitioners mention the hypothetical example of a dike which blocked 90 percent of the Mississippi River; next, they suggest that the Corps' interpretation must be wrong because no Congressional approval would be required for such a hypothetical structure (Pet. 17). The Petitioners would prefer an interpretation of the term "dike" to include "any dike" (Pet. 12). If the interpretation sought by Petitioners is adopted, however, the Congress would have to approve a thirty foot diked erosion retaining wall on the shoreline of the Chesapeake Bay (as well as the project which is challenged by Petitioners). In the *Leslie Salt* case, the court rejected such an interpretation because it would have the effect of making illegal the reclamation of vast areas of California, such as the Sacramento-San Joaquin Delta (R. App. 15a). The result is, at least, that the meaning of the term "dike" in Section 9 must be deemed ambiguous. Under the circumstances, the Fourth Circuit's reliance upon extensive legislative and administrative materials is completely justified (*supra*, at 5-7).

Under Section 9, Congress only reserved for itself the approval of diked structures that completely span a navigable waterway. The Fourth Circuit correctly held that the spoil disposal facility at Hart and Miller Islands is subject to Section 10 of the 1899 Rivers and Harbors Act.

CONCLUSION

For the reasons stated, this Court should not issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

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filed: October, 1980

APPENDIX

United States District Court
Northern District of California

No. C-72-561-WTS

Sierra Club, et al.,
Plaintiffs,

vs.

Leslie Salt Company, et al.,
Defendants.

OPINION

In 1972 plaintiffs Sierra Club, Save San Francisco Bay Association, Kent G. Dedrick (collectively Sierra Club) filed suit against defendant Leslie Salt Company (Leslie)[1] claiming that Leslie's levees on Bair Island were illegal obstructions to the navigable waters of the United States in violation of Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403. The Sierra Club contended that Leslie's levees were illegal because no permits had been issued by the Corps of Engineers, even though the levees were constructed at a time when, and in an area where, the Corps did not claim jurisdiction and did not require permits. The Sierra Club asked that Leslie's levees be declared to be illegal obstructions to navigation

[1] During the course of this litigation, Mobil Oil Estates (Bair Island Investments) Limited (Mobil) acquired Bair Island from Leslie. Leslie and Mobil stand in the same positions, vis-a-vis, The Sierra Club. They are referred to collectively as "Leslie" in this opinion.

and that Leslie be ordered to remove, or in the alternative to refrain from maintaining them. Leslie's answer denied the Sierra Club's allegation and raised a number of affirmative defenses including estoppel and surrender of jurisdiction. Plaintiff has filed a companion motion in limine to exclude evidence on these affirmative defenses. That motion becomes moot as a result of the ruling on this motion to dismiss.

In its present posture this lawsuit only involves Bair Island. More importantly, the sole remaining legal issue in this lawsuit is the legality of the existing levees on Bair Island. The motion involves two sub-issues which have arisen repeatedly in this action: (a) the absence of a private right of action under the circumstances of this case; and (b) the failure to join an indispensable party.

The question whether Sections 9 and 10 of the Rivers and Harbors Act of 1899 give rise to a private cause of action for their enforcement has been resolved by Judge Sweigert in this case in favor of plaintiffs. *Sierra Club v. Leslie Salt Company,* 354 F. Supp. 1099, 1103-05 (N.D. Ca. 1972). Leslie did not appeal from this ruling but Judge Sweigert's ruling has subsequently been confirmed in other cases as the law in this circuit. See *Riggle v. California,* 577 F.2d 579, 582-83 (9th Cir. 1978); *Sierra Club v. Morton,* 400 F. Supp. 610, 622-25 (N.D. Ca. 1975) (appeal pending).

As to the second issue, the court is of the opinion that the motion to dismiss should be granted. Thus, the issue of joining an indispensable party becomes moot.

Sections 9 and 10 of the Rivers and Harbors Act of 1899 are quoted repeatedly in the briefs of the parties and will not be repeated in this opinion. Section 9 requires Congressional approval for construction of any structure (such as Leslie's levees) and Section 10 delegates approval to the Corps of Engineers.

The parties agree that if Section 10 applies then consent or approval by the Corps must be shown, together with the serviceability of the levees.

Has consent been demonstrated? I think it has. Prior to 1972, the Corps had administratively determined that the landward extent of its jurisdiction in the marshland areas of south San Francisco Bay (such as Bair Island) was the "edge of the marsh," which is equivalent to the shoreline on the U.S. Coast and Geodetic survey charts of the area. The Corps did not require permits for construction of the levees around Bair Island because they were landward of the edge of the march. The Corps has consistently maintained that the levees are legal, because they were constructed at a time when and in an area where no permits were required.

In addition, any possible question regarding the legality of the Bair Island levees has been resolved by the Corps' regulations adopted in July, 1977. These regulations permit the continued existence and maintenance of all structures which were constructed at a time when the Corps did not assert jurisdiction over the area in which they are located. 33 C.F.R. § 322.4 provides in pertinent part as follows:

> § 322.4 Structures and work permitted by this regulation. The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits.
>
> > (c) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or of any currently serviceable structure constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure, and further provided that the structure to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction;
>
> * * * * * *

> (g) Structures or work completed before 18 December 1968 or in water-bodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

There is no dispute that Leslie's levees are "structure[s] constructed prior to the requirement for authorization." Until 1972, the Corps did not assert that Leslie's levees lay within the Corps' jurisdiction or that their construction and maintenance required a Corps permit. In fact, Judge Sweigert found that the "dikes . . . have been in place for more than 20 years — and in most cases more than 50 years — without objection by the federal government." *Sierra Club v. Leslie Salt Company,* 412 F. Supp. 1096, 1104 (N.D. Ca. 1977). There is also no dispute that Leslie's levees are "currently serviceable." See Affidavit of D.G. Warren attached as Enclosure 1 to this opinion, which is not controverted. Leslie's levees thus fall within the express provisions of 33 C.F.R. § 322.4(c). The levees also fall within the terms of 33 C.F.R. § 322.4(g) because they were constructed prior to 18 December 1968, and in an area where the Corps had not asserted jurisdiction.

The Corps' permission for Leslie's levees is conclusive in this lawsuit. Congress has exclusive power to regulate structures and obstructions in the navigable waters of the United States. Congress has delegated this power to the Secretary of the Army and the Corps of Engineers under the Rivers and Harbors Act.

The balance of the Sierra Club's opposition to Leslie's motion to dismiss is based on the assertion that Congressional permission under Section 9 of the Rivers and Harbors Act is also required. The only remaining issue then is the applicability of Section 9. As discussed in the paragraphs which follow, Section 9 simply does not apply to the construction and/or maintenance at Leslie's levees.

Leslie stresses that it is only the existing levees, not any potential future development, which is at issue here. If

Leslie's existing levees are legal, that ends the lawsuit, regardless of whether or not any future development would be legal without a Corps of Engineers permit.

The Sierra Club contends that Leslie's levees are subject to the Congressional approval requirement of Section 9 because they are "dikes" within the meaning of that section. The Sierra Club's contention is premised, however, on a broad dictionary definition of the term "dike" which ignores the interrelationship of Sections 9 and 10, their legislative history, and the Corps of Engineers' consistent administrative practice, as well as the untoward results which would flow from this overbroad construction.

The defendant has explored the legislative history of Section 9. I will incorporate this scholarly research in the paragraphs which follow because I believe it to be persuasive on the definition of the word "dike" as intended by Congress.

It is clear that Congress, when it enacted the Rivers and Harbors Act, did not intend to require congressional approval for every wall, embankment or structure built in the navigable waters of the United States. For example, the first clause of Section 10 states that "[t]he creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . . " 33 U.S.C. § 403. Nonetheless, it has been repeatedly held that Section 10 requires only the approval of the Secretary of the Army and the Corps of Engineers, not Congressional approval, for the construction of the structures enumerated or for the conduct of dredging and filling operations. *E.g., Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929). And yet, "breakwaters," "bulkheads," "jetties," and "weirs" (all of which are specifically enumerated in Section 10) could all be considered "dikes" within the dictionary definition of that term. Similarly, virtually all dredging and filling operations require some sort of embankment or retaining wall to hold the fill in place; these structures could also be

considered "dikes" within the broad definition of that term. Clearly, Congress did not intend such a construction, both because it would render Section 10 meaningless and because it would make permit requirements turn on questions of pure semantics. The question is: what did Congress intend?

Sections 9 and 10 establish a two-tier system of governmental approvals for projects in navigable waters. Certain classes of structures and projects require only the approval of the Corps of Engineers under Section 10. Other facilities require Congressional approval under Section 9. Semantics aside, the types of structures described in Sections 9 and 10 (as well as the legislative history of those sections discussed below) clearly indicate that Congress intended to require its approval only for those *major* structures which *cross* navigable waterways and thereby obstruct navigation. The four structures named in Section 9 are all of this type: bridges, dams, dikes and causeways. Congress, on the other hand, did *not* intend to require its approval for every minor bulkhead, embankment or other structure built in the navigable waters of the United States, if for no other reason than that such a requirement would be hopelessly cumbersome and impracticable. Sections 9 and 10 "should be construed in light of the administrative exigencies which prompted the delegation of authority [to the Corps of Engineers] in the succeeding clauses." *Wisconsin v. Illinois,* 278 U.S. 367, 412 (1929).

The test of the applicability of Section 9 must therefore be a *functional* one, not a semantic one. That test was succinctly described by the Court in *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971):

> The legislative history shows that Congress enacted the Rivers and Harbors Appropriation Act of 1899 as a comprehensive plan for keeping our interstate waterways clear of unreasonable obstructions and structures. It required approval of the federal government for work on navigable interstate waterways.

> Every structure built in a navigable waterway required the approval of the Chief of Engineers and the Secretary of War (now the Secretary of the Army). *In addition, for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation,* Congressional consent was required. This distinction was written into the law apparently because of the belief that Congress could not constitutionally delegate to the Secretary of War or to any other agency the authority to permit an obstruction of a navigable waterway. *Id.* at 1306 (emphasis added).

The language of Sections 9 and 10 supports this distinction: that Congressional approval is required only for structures which cross a navigable waterway and which constitute an obstruction to navigation. The first proviso to Section 9, which in effect delegates Congress' approval power to the legislature of a State in certain instances, provides:

> That such structures [bridges, dams, dikes and causeways] may be built under authority of the legislature of a State *across* rivers and other waterways *the navigable portions* of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced. . . . 33 U.S.C. § 401 (emphasis added)

Section 10, on the other hand, does not refer to obstructions to navigable waterways, but rather to "obstruction[s] . . . to the navigable capacity of any of the waters of the United States." In other words, Section 10 applies to structures which affect navigation, even if they do not physically obstruct it. See, *e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). Section 9, by contrast, applies to those enumerated structures which physically obstruct navigation because they are built *across* a navigable waterway. *Petterson v. Resor, supra.*

The legislative history of Sections 9 and 10 also clearly reinforces this distinction. The current statutory provisions were added to the 1899 Rivers and Harbors Act literally at the last minute without any Congressional debate. These sections, along with Sections 11-20, were added wholesale because they were felt to be merely clarifications of existing law. 32 Cong. Rec. 2297-2298 (Feb. 24, 1899); *United States v. Republic Steel Corp., supra* at 486. Sections 9 and 10 (which were originally Sections 12 and 13 of the Senate version of H.R. 11795) were intended to replace Section 7 and part of Section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454 (1890).

The "obstruction to the navigable capacity" language of the current Section 10 was found in Section 10 of the 1980 Act. Significantly, however, Section 7 of the 1890 Act, which formed the basis of most of the current Sections 9 and 10, prohibited the construction of: any wharf, pier, dolphin, boom, *dam,* weir, breakwater, bulkhead, jetty or structure of any kind . . . in such a manner as shall obstruct or impair *navigation,* commerce, or anchorage" of the navigable waters of the United States without the approval of the Secretary of War. 26 Stat. 454 (1890) (emphasis added). Section 7 also prohibited the construction of any bridges or causeways under the authority of a state legislature without the approval of the Secretary of War. The term "dike" was not used in either Section 7 or Section 10.

The revisions which resulted in the 1899 Act effected certain slight but significant changes. All of the structures enumerated in the former Section 7 *except dams* were not prohibited (in the absence of federal permission) if they obstructed the *navigable capacity* of the waters of the United States, not just if they obstructed navigation. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Dams, on the other hand, were included with bridges and causeways and were prohibited (absent federal permission) if they obstructed *navigation*. Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401. These

structures obstruct navigation because they are built *across* navigable waterways. "Dikes" were added to this latter group. In view of the origin of the current statutory provisions, the term "dike" must be viewed as being similar to the term "dam." These structures, which now require Congressional approval, are built *across* navigable waterways and thereby *obstruct* navigation.

The debates in 1890 also reflect Congress' overriding concern with structures which were built *across* navigable waterways and which obstructed navigation. Section 7 of the proposed 1890 Act (H.R. 9486) was scarcely debated. However, Sections 4 and 5 of H.R. 9486 were hotly debated. These sections proposed to authorize the Secretary of War to order the removal of bridges, particularly railway bridges, across navigable waters which he found to be obstructions to navigation. *See, e.g.,* 21 Cong. Rec. 5144-5146 (May 22, 1890) remarks of Reps. Breckenridge, Henderson and Blanchard); 21 Cong. Rec. 5397-5403 (May 28, 1890) (remarks of Reps. Blanchard, McCreary, Breckenridge and Grosvenor); 21 Cong. Rec. 8602-8607 (August 15, 1890) (remarks of Sens. Gray, Vest and Dolph). It is clear from the debates that Congress was most concerned with bridges and other structures built *across* navigable waterways, because these structures actually obstructed navigation, and intended to exert some form of direct federal control over such direct obstructions to navigation. *See, e.g.,* 21 Cong. Rec. 5401, 5402, 5403, 8604, 8605 (May 28 and August 15, 1890).

The distinction between obstructions to navigation and obstructions to navigable capacity contained in the 1890 Act and carried over into the 1899 Act is by itself highly instructive of the meaning of the term "dike" in Section 9 of the 1899 Act. In addition, various Congressional documents from the last decade of the nineteenth century shed further light on the meaning of this term. The laws regulating the navigable waters of the United States were frequently revised during the end of the nineteenth century. By Section 2 of the Act of June 3, 1896, 29 Stat.

234, Congress directed the Secretary of War to make a compilation of the general laws relating to the maintenance, preservation and protection of the navigable waters of the United States, together with recommendations for their revision. This compilation (which was prepared for the Secretary by the Corps of Engineers) was transmitted by the Secretary to the Speaker of the House on February 13, 1897. H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897). The Secretary's report contained a "draft of [a] proposed act revising and enlarging [the] laws for [the] protection of navigable waters." H.R. Doc. No. 293 at 8-13. Sections 1 and 2 of the proposed act are *identical* to Sections 9 and 10 of the Rivers and Harbors Act of 1899. In fact, it was this very proposed act which was introduced and adopted intact by Congress in 1899. 32 Cong. Rec. 2297-2298 (Feb. 24, 1899).

The proposed act was drafted by the Corps of Engineers, in particular by G.W. Koonce (later Judge Koonce), then with the office of the Chief of Engineers. Fortunately for later generations, Judge Koonce gave a speech on April 23, 1926 in which he described the genesis of Sections 9-20 of the Rivers and Harbors Act of 1899. Fortunately again, Judge Koonce's speech was submitted to Congress in testimony by Brig. Gen. R.H. Groves, Deputy Director of Civil Works in the office of the Chief of Engineers, before the House Committee on Public Works. *Water Pollution Control Legislation — 1971 (Oversight of Existing Programs): Hearings before the House Comm. on Public Works,* 92d Cong., 1st Sess. 261, 284-291 ("1971 Hearings"). In his speech, Judge Koonce had occasion to comment on the precise issue before this Court. He stated in pertinent part:

> Section 9 of the act [the Rivers and Harbors Act of 1899] applies to that class of structure such as bridges and dams *which extend entirely across a waterway,* and which if built without proper regulation and control may completely block navigation.
>
> * * * * * *

> Section 10 relates to the construction of works in the nature of wharves, piers, jetties, and the like, *which project into, rather than across*, the bodies of water in which they are located; and also to making excavations or fills, or change of any kind in the condition or capacity of navigable waterways.

1971 Hearings at 288-289 (emphasis added).

Judge Koonce's statements resolve whatever ambiguity may have existed in the meaning of Sections 9 and 10 of the 1899 Act.

Finally, this interpretation of Sections 9 and 10 is confirmed by 80 years of consistent administrative practice by the Corps of Engineers under the statute. The Corps of Engineers has defined "dike" for the purposes of Section 9 as follows:

> The term "dike" means an embankment, low dividing wall, or other protective barrier that *completely spans a navigable water of the United States* and that may obstruct interstate water-borne commerce. 33 C.F.R. § 321.2(c). (emphasis added).

As the Supreme Court observed in connection with interpreting Section 10 of the Rivers and Harbors Act:

> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. *Wisconsin v. Illinois, supra,* 278 U.S. at 413.

The term "dike" in Section 9 thus refers to structures which completely span a navigable waterway and which obstruct navigation. Leslie's levees on Bair Island are not "dikes" within the meaning of Section 9 both because they do not span a navigable waterway (whether that waterway be considered to be San Francisco Bay as a whole or a particular creek or slough, such as Redwood Creek or Corkscrew Slough) and because they do not obstruct navigation. Leslie's levees simply enclose former marsh-

land. *Sierra Club v. Leslie Salt Company*, 412 F. Supp. 1099 (N.D. Ca. 1976). Section 9 is therefore not applicable to the Bair Island levees.

The Sierra Club's contention that Leslie is subject to the Section 9 approval requirements is based solely on three cases: *Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd* 425 F.2d 97 (2d Cir. 1970); *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Ca. 1975), *aff'd in part and rev'd in part on other grounds sub nom. Sierra Club v. Andrus*, No. 76-1464 (9th Cir., Oct. 31, 1979); and *Hart and Miller Islands Area Environmental Group v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978). The Sierra Club not only failed to examine the legislative history of the statute and the administrative practice thereunder, it neglected to mention that *Petterson v. Resor, supra*, reaches precisely the opposite conclusion. More importantly, the *Petterson* case examines the underlying legislative history and administrative practice, whereas the *Citizens Committee for the Hudson Valley* line of cases expressly disclaims any such examination. Compare *Petterson v. Resor*, 331 F. Supp. at 1305-1306, with *Citizens Committee for the Hudson Valley*, 302 F. Supp. at 1089. As the *Petterson* court observed:

> Here, defendants presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*. This evidence supports the defendants' contention that Section 401 requires Congressional consent for dikes only when they are obstructions to navigation. To accept plaintiffs' contention that any structure within the dictionary definition of a dike requires Congressional consent is to ignore the language and purpose of the legislation and its interpretation for almost 70 years.

331 F. Supp. at 1306.

The *Petterson* court went on to discuss the practices of the Corps of Engineers and the unreasonable results that would follow from the plaintiffs' construction of Section 9

(which is identical to the one urged by the Sierra Club here):

> In *Wisconsin v. Illinois*, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1928), the court examined the practice of permitting the Secretary of War to issue permits under Section 403 without Congressional approval and stated:
>
> > This construction of § 10 [of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 403)] is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpreting a doubtful or ambiguous statute. *Id.* at 413, 49 S. Ct. at 170.
>
> Since that time, the Secretary of the Army and the Corps of Engineers have followed this practice. In 1937, the Secretary issued a permit to construct a fill in the East River to support a 9,000-foot runway for the LaGuardia Airport; in 1942, he issued a permit for a 12,000-foot runway in the Jamaica River for the John F. Kennedy Airport (then Idlewild); in 1960, he granted a permit for runway extensions into San Francisco Bay for the San Francisco International Airport; and nine years later, he authorized the Oakland International Airport to construct diking and dredge filling of the San Francisco Bay for runway extensions.
>
> There are numerous other instances in which the Secretary authorized major projects under Section 403, even when the work to be performed was loosely referred to as a "dike," if the proposed improvement did not obstruct navigation.
>
> To accept the plaintiffs' construction of Section 401 would make Section 403 meaningless because "jetties," "breakwaters" and "fills," mentioned in Section 403, all come within plaintiffs' dictionary definition of dikes.

331 F. Supp. at 1306.

As another court subsequently observed, "[t]he impact of *Citizens Committee for Hudson Valley* . . . has been

substantially altered by the reasoning of *Petterson v. Resor.*" *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp. 101, 113 (D.N.J. 1978) (citations omitted).

The *Sierra Club v. Morton* decision (involving the Peripheral Canal) cited by the Sierra Club does not support the Sierra Club's contention. Judge Renfrew did hold that Congressional approval under Section 9 was necessary, but that holding was expressly predicated on a finding that "[a]t the point where the Canal crosses the Middle River, the Canal will result in the *complete damming* of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location." 400 F. Supp. at 626 (emphasis added). Thus, Judge Renfrew simply held that a structure which completely spans a navigable waterway and obstructs navigation requires Congressional approval under Section 9.

Finally, as the *Petterson* court observed, the Sierra Club's construction of Section 9 is not only hopelessly cumbersome, it would also lead to untoward and completely unacceptable consequences. The Corps of Engineers has consistently regulated the construction of such projects as major airports, including LaGuardia and Kennedy in New York and San Francisco and Oakland on the West Coast, under Section 10 because they are not built across a navigable waterway and do not obstruct navigation. Are these airports now to be declared illegal? Furthermore, Leslie's levees are built on former *marshland,* which the Corps of Engineers not only considered to be beyond its jurisdiction, but also which Leslie and its predecessors in interest were *required* to reclaim by the construction of levees and drains under the Arkansas Swamp Act. Act of September 28, 1850, 9 Stat. 519, now codified at 43 U.S.C. §§ 982 and 983. Bair Island was segregated as swamp and overflowed land on the federal township plats, and federal swamp and overflowed patents nos. 176, 190 and 191 were issued to Leslie's predecessors in interest covering all of Bair Island. *See* Exhibits 132 and 133 to the Statement of

Facts filed by Leslie on or about May 16, 1975 in Action No. C-73-2294; Admissions Nos. 1, 93 and 94 of the Corps of Engineers' Admissions of Fact and Genuineness of documents filed in Action No. C-73-2294; Admission No. 3 of Sierra Club's Admissions of Fact and Genuineness of Documents, filed on or about March 13, 1975. If the Sierra Club's contention were to be sustained, the reclamation of Bair Island (which includes the construction of levees) by Leslie and its predecessors, which was directed by the Arkansas Swamp Act, as well as the reclamation of additional vast areas of California, such as the Sacramento-Joaquin Delta, would be illegal. The absurdity of this result clearly shows the invalidity of the Sierra Club's contention. Moreover, since the levees were constructed pursuant to a Congressional mandate to reclaim swamp and overflowed lands, it can be said that Congressional approval, if necessary, has been given.

Whatever else may be said about Leslie's levees, it is clear that they are not built across a navigable waterway of the United States. They were built on historic marshland. They do not wholly cross the San Francisco Bay or any of the navigable sloughs which border or cross Bair Island. They are therefore not dikes within the meaning of Section 9, and no Congressional permission was required for their construction or for their continued existence.

In view of the conclusion reached, the defendants' motion to dismiss is GRANTED.

Dated: January 15, 1980.

OWEN E. WOODRUFF, JR.,
United States Magistrate

Supreme Court, U. S.
FILED
OCT 14 1980
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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the permit for the construction of a containment facility for dredged materials at Hart and Miller Islands in the Chesapeake Bay was properly issued pursuant to Section 10 of the Rivers and Harbors Act of 1899 or whether Congressional approval is required for such a facility pursuant to Section 9 of the Rivers and Harbors Act?

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OPINIONS BELOW — JURISDICTION — STATUTES INVOLVED

The opinions below have been properly identified by the Petitioners and this Respondent accepts the Petitioners

statement regarding jurisdiction and the recitals of the relevant statutes.

STATEMENT OF THE CASE

This Respondent is constrained to restate certain elements of the case because of Petitioners characterizations.

INTRODUCTION

Hart and Miller Islands at the time of the permit application in 1972 were privately owned islands which together with Pleasure Island at one time formed a peninsula reaching eastward into the Cheasapeake Bay from Baltimore County. During the past century the islands have eroded to the point where their acreage has dwindled from a total of 388 acres in 1849 to less than 127 acres today. If left alone the islands would disappear in less than 70 years.

The State of Maryland has proposed to construct a containment facility adjacent to these islands into which will be placed dredged materials from the Baltimore Harbor. Maintenance dredging of the channels in the Baltimore Harbor is of vital concern to the economic health of the Port of Baltimore and no large facility exists for the placement of this spoil. This proposed facility is an environmentally creative solution to a difficult problem.

The spoil containment project serves two primary purposes (1) the safe disposal within a defined perimeter thus preventing uncontrolled discharges into the Chesapeake Bay and (2) the restoration and future protection of the islands. The project involves the pumping of material into the enclosure where the sediments would settle and the supernatant water would slowly percolate through the bottom of the containment walls until a water level equilibrium is reached. Three sluice gates would be provided in order to prevent overtopping and washout

during the later periods of sediment disposal. Water which eventually would be discharged through the sluice gates will be treated if necessary to maintain water quality standards.

PERMIT PROCESS

The State of Maryland applied for a Section 10 (33 U.S.C. § 403) dredge and fill permit on February 25, 1972. This application triggered a federally coordinated review process including a complete environmental impact statement. On October 18, 1972 the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 125 *et seq.*, were enacted into law. Section 404 of that Act required an additional and parallel Corps of Engineers permit for the discharge of the dredged spoil to a disposal site. The Section 404 and Section 10 permits were subsequently processed together requiring additional evaluation and duplicative hearings by the appropriate federal agencies. During the processing, the Corps of Engineers' official procedure dictated that both Section 10 and Section 404 permits applied to fill areas which did not span a navigable waterway, regardless of whether these areas were bulkheaded, diked or revetted (Court of appeals App. 133, 134). Furthermore, during this process, the Corps of Engineers determined that the subject project would *not* obstruct navigation but would have a beneficial effect since the disposal area would be utilized for the placement of dredged material from federal projects authorized by Congress to improve navigational channels in Baltimore Harbor. The containment area would not interfere with any navigable channel nor would it span a navigable waterway and its intrusion into the Cheaspeake Bay would be approximately 4,000 feet in an area where the Bay is approximately 7 miles wide.

This Respondent must correct certain misleading statements made in the Petitioner's section entitled "Factual Background".

The Hart and Miller Island facility is needed regardless of whether the Baltimore Harbor is ever dredged to 50 feet. There is no direct connection between the project and the proposals to take the Harbor depth to 50 feet.

The Corps did not seek the consent of Congress because such consent is not needed-not because of "political realities". The Corps has consistently held that projects such as this do not require Congressional authority.

If the islands have been used for recreational purposes it was without the owners approval or permission.

DISTRICT COURT PROCEEDING

This Respondent accepts the recital of the proceedings set forth by Petitioners, but states in addition the following.

The District Court curiously chose to follow the Second Circuit decision in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), *cert. denied Parker v. Citizens Committee for the Hudson Valley,* 400 U.S. 949 (1970), by applying the dictionary meaning to the term "dike", after it acknowledged the complex structure of Sections 9 and 10 (App. 40a). The Court also established an unworkable two tier regulatory pattern which would require a judicial determination that the "dike" constituted an obstruction to navigation before imposing the necessity of Congressional approval. This process would, given the application of the broad dictionary meaning, require a judicial determination for any "bulkheaded", "riprapped" or "diked" area that an obstruction exists before submission to Congress. The lower court also emphasized that Section 9 "applied to any dike *over* or *in* any navigable water", reasoning that the word "in" excluded structures which were within but also crossed a waterbody.

Respondents, moved for an immdiate rehearing and submitted a number of administrative materials, including a speech by Judge G. W. Koonce, the principal author of the 1899 legislation, as well as Congressional testimony of the Secretary of War in 1916. The motion for reconsideration was argued on November 17th. On November 22, 1978 the court denied reconsideration by written opinion, which did not treat the administrative and legislative materials.

FOURTH CIRCUIT PROCEEDING

The Court of Appeals determined that Section 9 of the Rivers and Harbors Act did not apply to this project. This holding recognized the intricate relationship between Sections 9 and 10 and the need to give meaning to these provisions by resorting to legislative history and the eighty years of Corps' administrative practice.

The Court reasoned that the predecessor statute, the 1890 Rivers and Harbors Act was designed to assert federal regulation over the obstructions to navigable waterways. Section 7 of that Act prohibited the construction of any obstruction without approval of the Secretary of War. Bridges, bridgedraws, bridge piers and abutments, causeways or other works over or in any navigable waters were prohibited even though authorized by a state legislature until the plans for such works were submitted and approved by the Secretary of War. Section 7 was transposed into §§ 9 and 10 during the 1899 recodification process. Section 9 differed from the language of the 1890 Act because congressional approval was required for the licensing of the listed structures which now included "dams" and "dikes". The Fourth Circuit concluded that the prevailing precedents in *United States v. Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1890), *United States v. Rider,* 50 F. 406 (S.D. Ohio 1891), required Congressional approval in those situations where agency approval would have been an unconstitutional delegation in regard to

those structures which crossed navigable, interstate waterways. This legislative history was supported by the agency practice expressed by Judge G. W. Koonce in his lecture to the Company Officer's Class, Engineer School Fort Humphrey's Virginia on April 23, 1926, as reproduced in Hearings on Water Pollution Control Legislation — 1971 before the House Committee on Public Works, 92nd Cong., 1st Sess., Ser. 92-10, 284-291, at 288 (1971).

The record in this case shows a consistent interpretation by the Corps of Sections 9 and 10 for a period of over eighty years. In *Wisconsin v. Illinois,* 278 U.S. 367 (1929), this Court sanctioned reliance upon the Corps' administrative interpretation and administration of these provisions. Finally, the Corps' practice was reviewed by Congressional Conferees of the 1972 Water Pollution Control Act Amendments when adopting an overlapping dredge and fill regulatory framework. The Fourth Circuit noted that the expansive reading of Section 9 pursued by Petitioners could render Section 10 meaningless since structures listed there, such as jetties, breakwaters and fills would fall within Section 9 authority. The Court found that the Corps' management of the subject program presented a clear and workable relationship between the two sections.

ARGUMENT

THE FOURTH CIRCUIT DECISION IS CORRECT.

Petitioners contend that the Court of Appeals decision contained "the veneer of careful analysis" because it (1) determined that the relationship between §§ 9 and 10 was not clear on its face and (2) therefore did not apply the dictionary definition of a "dike". Their rational is too facile. The veneer of careful analysis of the Fourth Circuit decision reflects an acknowledgement by this Honorable Court in *Wisconsin v. Illinois, supra,* that the specific

provisions in question are intricate and in need of charification.

> "Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . . .
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. . . .
>
> The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. . . . The fact that the Secretary of War acted on this view was made known to Congress by many reports". 278 U.S. 367, 412-414 (Citations omitted).

A review of *Citizens Committee for the Hudson Valley v. Volpe, supra,* together with *Petterson v. Resor,* 331 F.

Supp. 1302 (D. Ore. 1971), *remanded as moot,* 494 F.2d 124 (9th Cir. 1974), *Sierra Club v. Morton,* 400 F. Supp. 610 (N.D. Cal. 1975), *aff'd in part, rev'd in part,* 610 F.2d 581 (9th Cir. 1979), *and Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp 101 (D.N.J. 1978) compels the conclusion that the recodification of the 1890 Act, and in particular the transformation of § 7 of the Act into §§ 9 and 10 of the 1899 Act, necessitate an indepth investigation of the legislative history.

Hudson Valley disregards the contemporaneous occurrences which surrounded this recodification. Numerous contemporaneous decisions cite the problems of bridges obstructing navigation over navigable waterways. See *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1887), *Gilman v. Philadelphia,* 70 U.S. 713 (1866). Bridge building for railways and highways was heightened during this general time period because of the development of improved steel making processes by Bessemer. See generally, D. Jacobs and A. E. Neville, *Bridges, Canals and Tunnels: The Engineering Conquest of America* (1968).

When § 7 of the 1890 Act was transposed into § 9 certain parts of bridges, i.e. bridgepiers and bridgedraws, were no longer included within the category of bridges and causeways and in their stead were included the words "dike" and "dam". These additions were clearly intended to be within that class of structures which crossed a waterway and when placed within Section 9, Congressional approval was mandated for any of these structures placed on interstate streams.

The 1899 recodification also changed the general prohibitory language utilized for the authorization of *intra* state bridges, bridgedraws, bridgepiers and causeways. The 1899 recodificiation affirmatively granted state legislatures authority over the licensing of bridges, dams, dikes and causeways "across" waterbodies. The recodifier eliminated the same parts of bridges in the interstate provisions and in addition, because he changed the general prohibition to an affirmative grant of authority, he substituted the word "across" for the words "in" or "over". The categories of structures are identical. It is difficult to conclude that Congress would impose an inconsistent treatment for the same structures, giving the states authority over structures completely crossing a waterway, while reserving Congressional approval for marginal structures.[1]

HUDSON VALLEY DOES NOT PRESENT A REAL CONFLICT BETWEEN THE SECOND AND FOURTH CIRCUITS

The thrust of Petitioners case lies in the apparent conflict between the Second and Fourth Circuits Contrary to Petitioners implication (Pet. 13) no other circuit or district court has followed the Second Circuit decision (*Hudson-Valley, supra).*

By avoiding an indepth analysis, by focusing on one word and by presenting an unworkable regulatory

[1] This interpretation is supported by delegation by Congress of authority to various federal agencies to approve bridges, and dams in interstate navigable waters. See the General Bridge Act of 1946, 60 Stat. 847, 33 U.S.C., Section 525. See also, 49 U.S.C. 1651 (Department of Transportation).

framework stripping Section 10 of substance, *Hudson Valley* has become an anomaly. Furthermore, *Hudson Valley* was decided prior to passage of § 404 of the 1972 Water Pollution Control Act Amendments, which imposes a parallel permit requirement for the disposition of dredged spoil. An examination beneath the so-called "veneer of careful analysis" of the Fourth Circuit decision contrasted with the superficial, unforeseeing affirmance by the Second Circuit requires adherence to the reasoning of the Fourth Circuit. Petitioners themselves note the new impetus for the placement of dredged spoil into containment areas as refleted in the adoption of the 1977 Clean Water Act, Publ. L. No. 95-217, 91 Stat. 1566, 1577-78 (1977). The legislative history reviewed by the Fourth Circuit attributable to this most recent and parallel enactment forecloses all further question. The Corps has adhered to its practice of regulating marginal structures pursuant to Section 10 and those structures which span or cross a navigable interstate waterbody under Section 9. Their constancy has provided a degree of permanency to present and future applicants. Contrary to Petitioners' exhortations (Pet. 17), before authorizing Section 10 projects, the Corps must make an affirmative finding that such project does not obstruct navigation within that waterbody.

The Second Circuit in *Hudson Valley* spent very little time considering the Section 9 and 10 problem-in fact they considered the entire situation in one paragraph and adopted the District Court's opinion. 425 F.2d at 106. A review of the District Court opinion, *Citizens' Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083 (S.D.N.Y) 1969) reveals that it is distinguishable both factually and legally. The District Court said:

> "In the absence of any legislative or judicial authority to support the defendants' theory of statutory inter-

pretation we apply ordinary meaning to the term 'any dike'" *Id.* at 1089.

Thus, the District Court is saying that since it has no legislative history it must look to the dictionary definition of the word "dike". Presumably had it had legislative history it would not have found it necessary to go to the dictionary. Every case since *Hudson Valley* has had the benefit of legislative and administrative history and every case has found in favor of respondent's position. The most recent case was a decision by the Northern District of California, *Sierra Club, et al. v. Leslie Salt Company, et al.* (N.D. Cal. No. C-72-561-WTS, January 15, 1980). This case was decided before the Fourth Circuit rendered its opinion in *Hart and Miller Islands.*

Furthermore, the District Court case in *Hudson Valley* is factually distinguishable since the Court found the proposed construction would substantially affect navigation. There is no such finding in this case and in fact the Corps found to the contrary. The *Hudson Valley* case is an anomaly, is distinguishable and has not been followed by any Court.

CONCLUSION

The only argument that the Petitioners have as to why the Supreme Court should grant certiorari is that there is a split among the Circuits. However, an analysis of the cases shows this is not true. All cases since 1970 which have considered the question have decided the issue the same way as the Fourth Circuit in this case. The only case going the other way is *Hudson Valley* and for the reasons stated above that case no longer has any vitality.

For these reasons and for all the other reasons stated above, Respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the United States Army Corps of Engineers was authorized to issue a permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for the construction of a dredged spoil containment facility in Chesapeake Bay, or whether the approval of Congress was required for the project under Section 9 of the Act, 33 U.S.C. 401.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 621 F. 2d 1281. The opinion of the district court (Pet. App. 23a-56a) is reported at 459 F. Supp. 279. The supplementary opinion of the district court denying motions for reconsideration (Pet. App. 47a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1980. The petition for a writ of certiorari was filed on August 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 9 of the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. 401, provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided* further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the

Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

2. Section 10 of the Rivers and Harbors Act of 1899. ch. 425, 30 Stat. 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established habor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, habor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

3. Section 404(a) of the Clean Water Act, 33 U.S.C. 1344(a), provides in pertinent part:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge

of dredged or fill material into the navigable waters at specified disposal sites. * * *[1]

STATEMENT

1. On February 23, 1972, the State of Maryland applied to the United States Army Corps of Engineers for permission to construct what was called a "diked" disposal area for dredged materials that are to be removed from Baltimore Harbor. The disposal area is to be located on and adjacent to two small islands, known as Hart and Miller Islands, in the Chesapeake Bay, approximately 13 miles east of Baltimore Harbor. The islands are about one mile offshore at a point where the Bay is approximately seven miles wide. The project will entail connecting the two islands with a sand barrier to form one side of a rectangular disposal area located to the eastern, or Bay side of the two islands. Sand barriers will also be built to form the remaining three sides of the rectangular containment area, into which dredged spoil then will be pumped.

Eventually the water mixed with the spoil will percolate through the barrier, leaving a single enlarged island of approximately 1100 acres (Pet. App. 5a-6a). The dredged material from Baltimore Harbor to be deposited in the containment area includes spoil from routine maintenance dredging and additional spoil generated by the Baltimore Harbor Project, a Corps of Engineers project authorized by Section 101 of the Rivers and Harbors Act of 1970, Pub. L. No. 91-611, 84 Stat. 1818, to increase the depth of Baltimore Harbor.

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[1]The events in issue here took place prior to the adoption of the 1977 Amendments to the Clean Water Act. 91 Stat. 1566. These amendments made minor textual changes in Section 404(a) not relevant here.

The Corps processed the Maryland permit application under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344. The former provision empowers the Corps to permit placement of fill in navigable waters of the United States and to authorize construction of any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" in navigable waters. Section 404 also authorizes the Corps to regulate discharge of dredged spoil into navigable waters. After holding public hearings, and preparing draft and final environmental impact statements, the Corps issued the permit under Sections 10 and 404 on November 22, 1976.

2. Petitioners commenced this action on June 30, 1977, against the Corps, several of its officers, and the Secretary of the Army, seeking declaratory and injunctive relief voiding the Corps' permit. In addition to claims that the environmental impact statement was inadequate in various respects, petitioners alleged that the Corps' permit was improperly issued under Section 10 of the Rivers and Harbors Act of 1899 because, in their view, the barrier that would surround the fill constituted a "dike" for which congressional approval is required under Section 9 of the Act, 33 U.S.C. 401. Section 9 prohibits construction of any "bridge, dam, dike, or causeway over or in any * * * navigable water of the United States" without the consent of Congress, except where the navigable portion of the body of water is found in a single state.[2]

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[2]In cases falling within the exception, the approval of the Corps and the affected state are sufficient. 33 U.S.C. 401. It is undisputed in the present case that the Chesapeake Bay does not lie wholly within the State of Maryland.

On cross motions for summary judgment, the district court concluded that the Corps was not authorized to issue the permit to Maryland under Section 10 of the Rivers and Harbors Act of 1899 because the project fell within Section 9 of that Act (Pet. App. 23a-46a, 59a-60a). The district court held that congressional authorization was required for any structure within a modern dictionary definition of the term "dike," whenever navigation was displaced to any degree (Pet. App. 39a). The proposed structure was found to satisfy the test fashioned by the district court because "boating will be precluded in the space occupied by the containment area" and "will be moved further out into the Bay" (Pet. App. 42a). The court rejected the Corps' contention that relevant legislative history and longstanding administrative practice and interpretation limit the reach of Section 9 of the 1899 Act to structures that completely span a navigable waterway and therefore have the potential to block the flow of commerce on the waterway. The district court entered summary judgment for petitioners under Fed. R. Civ. P. 54(b) (Pet. App. 59a).[3]

3. The court of appeals reversed, holding that the "diked" disposal area "is not a dike within the meaning of Section 9 and is governed by Section 10 of the statute" (Pet. App. 4a). Based on its review of the language, legislative history, and administration of the 1899 Act (Pet. App. 11a-18a), the court of appeals concluded that the Corps' interpretation of Section 9 as applying to structures that completely span navigable waterways "is a

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[3]The district court did not consider the other issue raised by petitioners. However, following the court of appeals' decision reversing the district court's holding with respect to the application of Sections 9 and 10, the district court heard argument on October 10, 1980, on cross motions for summary judgment on the remaining claims.

perfectly reasonable construction of the statute, and it has been so construed by the Corps since its passage" (Pet. App. 15a). Moreover, the court found that the legislative history of Section 404(a) of the Clean Water Act, which was adopted in 1972 to authorize the Corps to issue permits for the discharge of dredged or fill materials into navigable waterways "at specified disposal sites" (see pages 2-3, *supra*), demonstrated "that Congress was not only aware of, but approved and encouraged the Corps' practice of issuing permits for diked disposal areas, without specific Congressional approval" (Pet. App. 18a).

Finally, the court of appeals concluded that "the expansive reading of Section 9 put forward by [petitioners] could render Section 10 meaningless, since structures such as jetties, breakwaters, and fills would be covered by Section 9 although they are literally within Section 10" (Pet. App. 20a). On the other hand, in the court's view, "[l]imiting Section 9 to waterway-spanning structures, as the Corps has done, provides a clear, convenient, and workable distinction between Section 9 and Section 10" and results in a "logical and consistent" construction of the two sections which "best effectuate[s] the intent of Congress" in dividing structures into those that have a sufficiently significant impact on navigation to require congressional approval and those that do not (*ibid.*). Accordingly, the court concluded that waterway-spanning structures that "are capable of completely blocking a navigable waterway" require congressional approval under Section 9, while structures that "merely protrude into a waterway and require only a rerouting of waterborne traffic" require only a Section 10 permit from the Corps.

ARGUMENT

1. a. The court of appeals' conclusion that the Corps of Engineers had authority under Section 10 of the Rivers

and Harbors Act of 1899 to issue a permit for the project is correct and does not warrant review by this Court. Section 10 of the Rivers and Harbors Act of 1899 authorizes the Secretary of the Army to authorize a party "to excavate or fill * * * the channel of any navigable water of the United States." The project involved in the case involves the deposit of "fill"—the material dredged from Baltimore Harbor—into the Chesapeake Bay, and thereby quite clearly falls within the scope of the Corps' permit authority under Section 10.

To be sure, the project design calls for construction of a sand barrier around the area into which the dredged material is to be deposited. But there is nothing in Section 10 that excludes a project of this type from the Corps' permit authority merely because the fill is to be contained by a barrier. To the contrary, the sand barrier itself would appear to be "fill" deposited in the Bay, and therefore within the scope of the Secretary's permit authority under Section 10. And, in any event, Section 10 authorizes the Secretary to permit the building of any "wharf, pier, dolphin, boom, weir, *breakwater, bulkhead,* jetty, *or other structures*" in navigable waters (emphasis added)—a range of activities that encompasses building of the containment structure to surround the dredged material in this case.

Notwithstanding the language of Section 10, petitioners argue that a different provision of the Rivers and Harbors Act of 1899—Section 9—withholds permit authority from the Secretary and requires congressional approval for the project involved here. Section 9 provides that it shall not be lawful to construct any "bridge, dam, dike, or causeway over or in" navigable waters of the United States until the consent of Congress has been obtained and the plans for the project have been approved by the

Secretary of the Army. Petitioners argue that the barrier around the containment area is a "dike" for which congressional approval is required under Section 9. It is true that the proposed project in this case has been termed a "diked disposal area." But it hardly follows that the barrier behind which the dredged material is to be deposited is the type of structure about which Congress was so concerned that Congress withheld from the Secretary of the Army the authority to permit its construction.

As the court of appeals observed (Pet. App. 20a), "Sections 9 and 10 * * * must be construed together in a logical and consistent manner in order to best effectuate the intent of Congress." Accordingly, it is necessary to identify a reasoned distinction between those structures Congress believed would have a sufficient impact on navigation that congressional approval should be required and those with a lesser impact such that the Secretary could be entrusted with the authority to permit their construction.

Petitioners' distinction is purely one of labels. If the structure may be called a "dike," congressional approval is required, irrespective of the impact the structure may have on the body of water or its navigability. As is evident, however, this reading of Section 9 makes no practical sense in a case such as this. Thus, petitioners do not contend that congressional consent would have been necessary under Section 9 if the Corps had granted the State of Maryland a permit to deposit fill in the same 1100-acre area *without* building a barrier around it; it is clear that the Corps could have issued a permit under Section 10 for such a project. It is only because the State has elected to build a barrier around the area in order to protect the water quality of the Bay from contamination

by the dredged material that petitioners contend that the project requires congressional approval. We cannot believe that Congress intended to make its delegation of permit authority to the Corps of Engineers under Section 10 depend on whether the perimeter of the containment area is to be constructed before the interior is filled; in either event, the total surface area of the navigable waters to be displaced by the fill and the effect on navigation are the same. An analysis of the language and administrative interpretation of the Act demonstrates that Congress did not, in fact, intend such an anomalous result.

The word "dike" in Section 9 cannot be read in isolation from the language and purposes of that section as a whole, and the complementary purposes of Section 10. An analysis of Section 9, in its entirety, demonstrates that Congress was principally concerned with those structures that will span the entire width of a body of water and thereby create a complete obstruction to navigation, or at least the potential for such an obstruction. Where a project might have such a drastic impact on the navigable body of water, Congress reserved the final decision to itself. But where the navigable water body is not fundamentally altered in this fashion, Congress was content to authorize the Secretary of War (now the Secretary of the Army) to permit projects and accommodate the requirements of navigation.[4]

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[4]As explained below (see page 16 note 11, *infra*), it is conceivable that Section 9 might also apply to a limited class of levees or dikes constructed in navigable waters for the purpose of rechanneling the navigable course of those waters or otherwise fundamentally altering their navigable capacity, even though the "dike" does not entirely span the waterbody. Cf. *Gibson* v. *United States*, 166 U.S. 269 (1897). That question is not presented in the present case, however, because there is no suggestion that the disposal area was designed to alter the navigable course of the Chesapeake Bay.

This interpretation of Section 9 is strongly suggested by its own terms. Section 9 applies to any "bridge, dam, dike, or causeway" over or in navigable waters. Bridges and dams are, by nature, structures that span a body of water. The word "causeway" also connotes a structure across a body of water or marshland, as a way of access to land on the other side. *Webster's Third New International Dictionary* 632 (1976); J. Murray, *A New English Dictionary* 358 (1897).[5] Read in para materia, the word "dike" in Section 9 therefore must also be taken to mean a structure that spans or cuts off a navigable body of water, or an arm of that body—*e.g.*, to reclaim the area behind the dike from the sea or to prevent flooding. J. Murray, *A New English Dictionary, supra.*[6]

The scope of Section 9 as reaching only structures that span the waterway or block navigation is also evident from the language of the first proviso to that section. The proviso states that, notwithstanding the prohibition in Section 9, bridges, dams, dikes and causeways "may be built under authority of the legislature of a State *across* rivers and other waterways the navigable portions of which lie wholly within the limits of a single State"

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[5]But see *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083, 1089 (S.D.N.Y. 1969), aff'd, 425 F. 2d 97, 106 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

[6]Indeed, J. Murray, *A New English Dictionary, supra,* defines the word "dike" as a "dam" or "causeway" in several of its definitions, and as a "barrier, obstacle, or obstruction." This strongly reinforces the view that the congressional approval requirement in Section 9 extends only to those structures that could be termed "dikes" which span the waterway and obstruct navigation. See also *Webster's Third New International Dictionary, supra* ("a bank usu. of earth constructed to control or confine water: LEVEE * * * a barrier preventing passage"). But see *Citizens Committee for the Hudson Valley* v. *Volpe*, note 5, *supra*, 302 F. Supp. at 1088-1089; 425 F. 2d at 106.

(emphasis added), provided that the location and plans thereof are approved by the Secretary of the Army before construction.

The interpretation of Section 9 evident from its language is consistent with the long-settled administrative construction of the section as well. Thus, in a lecture delivered to the Company Officer's Class of the Engineer School in 1926, G. W. Koonce of the Corps, who had been instrumental in drafting the Rivers and Harbors Act in 1899, stated that Section 9 applies only "to that class of structures such as bridges and dams which extend entirely across a waterway." Section 10, in Koonce's view, "relates to the construction of works in the nature of wharves, piers, jetties and the like, which project into, rather than cross, the bodies of water in which they are located."[7] Similarly, the Secretary of War testified before the House Commerce Committee in 1916 that Section 10 gives his department "the authority to permit or refuse to permit any obstruction, except the class which extend clear across a stream, however large and important, in any navigable water of the United States."[8]

The Corps' regulations, too, have consistently stated that Section 9 is applicable only to structures "across" a waterway. 33 C.F.R. 209.120(b)(1) (1974); 33 C.F.R. 209.120(b)(1)(a), 209.125(a) (1969); 33 C.F.R.

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[7]Koonce's statement is printed in *Hearings on Water Pollution Control Legislation—1971 (Oversight of Existing Program) Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 288-289 (1971). Koonce's statement is due particular weight because it reveals that he was continuously associated with the Corps starting in 1886 and was personally responsible for drafting the bill which became the 1899 Act.

[8]*Hearings on General Dam Legislation Before the House Comm. on Interstate and Foreign Commerce*, 64th Cong., 1st Sess. 18 (1916).

209.120(a)(1), (c) (1948). The most recent version of the regulations, promulgated in 1977 (42 Fed. Reg. 37139), is even more specific, defining a "dike" as "an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate water-borne commerce * * *." 33 C.F.R. 321.2(c) (1979). And, finally, as the court of appeals noted (Pet. App. 16a-17a), affidavits of Corps officials in the record in this case attest to a long-standing practice, traced back to 1920, limiting the application of Section 9 to waterway-spanning structures and specifically attesting to the consistent use of Section 10 for diked disposal facilities for dredged spoil since passage of the 1972 Amendments to the Clean Water Act. Reference to the Corps' interpretation is especially appropriate given its role in drafting the 1899 Act and continuing responsibility for all facets of its administration. *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929); see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[9]

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[9]There are virtually no legislative materials directly relating to the 1899 Act itself. The 1899 Act was drafted by the Corps at the direction of Congress. Rivers and Harbors Act of 1896, ch. 314, Section 2, 29 Stat. 202, 234; H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897). The 1899 Act was adopted with little discussion, on the strength of assurances that it contained no significant changes in prior law. 32 Cong. Rec. 2296-2297 (1899) remarks of Senator Frye); *id.* at 2923 (statement of House conferees). This Court accordingly has labeled the 1899 Act as the "rearranged result" of the Rivers and Harbors Act of 1899. *Wisconsin* v. *Illinois, supra*, 278 U.S. at 412.

The Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, made no mention of "dikes." Section 7 of the 1890 Act, 26 Stat. 454, however, contained three colorably relevant provisions, which, on their face, overlap (see Pet. App. 63a). The first clause (the source of the second clause of Section 10 of the 1899 Act), prohibited building of "any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, *or structure of any kind*" in navigable waters, beyond established harbor lines, without the permission of the Secretary of War (Pet. App. 63a; emphasis added). The second clause of Section 7

b. Section 404(a) of the Clean Water Act, first adopted in 1972, and its legislative history provide firm support for the Corps' interpretation of the 1899 Act. As enacted in 1972, Section 404(a) provided (emphasis added):

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters *at specified disposal sites*.

In an effort to diminish the importance of this provision, petitioners suggest (Pet. 20) that the reference to "disposal sites" is to both land and water-based facilities. This suggestion is plainly erroneous, for Section 404 governs discharge of fill "into the navigable waters." Petitioners also question (Pet. 20) whether the reference

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(the source of Section 9 of the 1899 Act) proscribed construction of "any bridge, bridge-draw, bridge piers and abutments, causeway, *or other works*" in navigable waters, pursuant to state legislation, without the approval of the Secretary (emphasis added). However, a proviso to the Section made it clear that states were not empowered by the second clause to license bridge works on interstate navigable waters. The effect of the proviso was to retain for *Congress* the authority to license bridge works in interstate navigable waters. 20 Op. Atty. Gen. 488 (1892). The legislative history of the 1890 Act shows that the second clause was designed to fill the gap in federal navigational controls revealed by this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 13 (1888), and cases cited therein, permitting states to construct water-spanning structures. 21 Cong. Rec. 8604-8605 (1890) (remarks of Senators Dolph, Edmunds and Gray). Finally, the third clause of Section 7 (the source of the third clause of Section 10 of the 1899 Act) prohibited excavation, filling, or other actions altering the condition of a navigable waterway without the approval of the Secretary. Clearly the clauses of Section 7 are mutually inconsistent unless some principled limitation is placed upon the reach of each, for each is literally applicable to structures that might be called a "dike." Thus, the distinction between structures which protrude into navigable waters without cutting off navigation and those that cut off navigation appears to have been implicit in the 1890 Act as well.

to "disposal sites" encompasses *diked* disposal facilities. But petitioners' doubt in this regard is entirely dispelled by the remarks of Senator Muskie, the primary Senate manager of the 1972 Amendments, when he presented the Conference Report. He stated that the "Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled"; he continued:

> At the same time the Committee *expects the Administrator* [*of EPA*] *and the Secretary* [*of the Army*] to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes—to identify land-based sites for the disposal of dredged spoil and, where land-based disposal is not feasible, *to establish diked areas for such disposal.*

118 Cong. Rec. 33699 (1972) (emphasis added). Thus, Congress clearly did not believe that the Corps needed to secure its approval for each and every diked disposal area constructed or permitted under the Clean Water Act.[10]

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[10]As petitioners note (Pet. 20), the remarks of Representative Vanik were principally concerned with diked disposal areas in the Great Lakes constructed pursuant to Section 123(a) and (h) of the Rivers and Harbors Act of 1970, 33 U.S.C. 1293a(a) and (h), which provides that Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, "shall not apply" to projects in the Great Lakes constructed pursuant to Section 123. But Senator Muskie's remarks on behalf of the Senate conferees plainly are not so limited. Moreover, contrary to petitioners' suggestion (Pet. 20-21), the provision in Section 123 of the 1970 Act that Section 9 of the Rivers and Harbors Act is inapplicable to Great Lakes projects does not reveal a congressional understanding that diked disposal areas require congressional approval under Section 9. Section 123 is best understood as a precautionary clarification of congressional intent with respect to the Great Lakes projects authorized therein. Indeed, Congress was fully aware that the Baltimore Harbor Channel Project, authorized by a

2. Petitioners urge (Pet. 11-15) that the Court grant their petition to resolve what they perceive to be a conflict in the lower courts regarding the scope of Section 9. They place principal reliance upon *Citizens Committee for the Hudson Valley* v. *Volpe,* 302 F. Supp. 1083 (S. D. N.Y. 1969), aff'd, 425 F. 2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970). In that case, the Corps had issued a permit under Section 10 for the construction of a state highway on fill in the Hudson River north of the Tappan Zee bridge.

The district court in *Hudson Valley* concluded, with little discussion, that retaining walls constructed of rocks (termed "dikes" in the Corps' permit and the State's plan) designed to prevent the fill from returning to the waterway were "dikes" within the meaning of Section 9, and therefore required congressional approval. The court apparently was not presented with, and therefore did not consider, the evidence of legislative intent and administrative interpretation considered by the Fourth Circuit in the present case. Indeed, the district court expressly noted that it was making its decision in "the absence of any legislative or judicial authority." 302 F. Supp. at 1089. Nor did the district court in *Hudson Valley* analyze the language of Section 9, read as a whole; its

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separate provision of the Rivers and Harbors Act of 1970, *would* entail use of diked disposal facilities. See H.R. Rep. No. 91-1665, 91st Cong., 2d Sess. 10 (1970); H.R. Doc. No. 181, 94th Cong., 1st Sess. xi, 7, 9, 11-12, 67, 79, 86 (1975). The September 21, 1970, Report of the Chief of Engineers and attached documents, which were the basis for congressional authorization, see 84 Stat. 1818, expressly required that diked disposal be employed. This report is reprinted in H.R. Doc. No. 181, 94th Cong., 1st Sess. 1-10 (1975). Thus the Rivers and Harbors Act of 1970 does not support petitioners' argument. In any event, more recent and unequivocal indications of congressional intent in connection with the 1972 Amendments to the Clean Water Act supersede any ambiguous indications that might be derived from the 1970 Act.

relationship with Section 10; or the policies that underlay Congress' decision to withhold permit authority from the Secretary with respect to the structures mentioned in Section 9. The court looked instead to the phrase "any * * * dike" in Section 9 in isolation and, applying what it believed to be the ordinary meaning of that word, concluded that the rock retaining wall was a "dike" within the meaning of that Section. The court rejected the government's suggested definition of the term "dike," drawn from a technical dictionary, as a wall or embankment "built as a training works for a river so as rigidly to confine flow within definite limits over the length treated." 302 F. Supp. at 1088.[11] Even accepting the government's definition, however, the court concluded that the rock embankment was a "dike" because it would control the river by preventing it from eroding the fill and returning to its natural shoreline and because the evidence showed that the structure would increase the force of the ebb tide by 10%. *Id.* at 1089.[12]

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[11]It is conceivable, as we suggested in *Hudson Valley*, that a structure that does *not* completely span a body of water, but is designed to confine and channel the waters of a river in a manner that fundamentally alters its course or flow may also be a "dike" requiring congressional approval under Section 9. See note 4, *supra*. But that question is not presented in this case, and its resolution may wait for another day.

[12]The district court in *Hudson Valley* erred in concluding that the proposed rock embankment was a dike in the ordinary meaning of that word. One of the definitions quoted by the court, like the technical definition offered by the government, expressly refers to a structure designed to control or hold back *waters* of a sea or river. 302 F. Supp. at 1089, quoting *Random House Dictionary of the English Language* 403 (1967). The rock structure in *Hudson Valley* had the opposite purpose of holding back the *earth*. The other definition quoted was from the *Webster's New International Dictionary* 730 (2d ed. 1954). As pointed out above (see note 6, *supra*), the Third Edition of that Dictionary refers to a bank of earth used to control *water*, not to prevent erosion of land.

The court of appeals affirmed in an opinion devoted primarily to "[i]mportant threshold questions" of jurisdiction and standing. See 425 F. 2d at 101-106. The court of appeals considered the merits of the controversy only "briefly," devoting but one paragraph to the question of whether a "dike" was involved. 425 F. 2d at 106. The court stated merely that it had "reviewed the pertinent evidence" and governing rules of statutory construction and adopted the conclusion of the district court that the word "dike" used in the Corps' permit had the same meaning as in Section 9, and that congressional approval was required. That is the sum of the Second Circuit's analysis. Thus, one cannot confidently discern from the Second Circuit's opinion whether it fully embraced the district court's "ordinary meaning" definition of the word "dike," or whether it saw no need to choose between that definition and the one proffered by the Corps because each was satisfied on the basis of the evidence in that case. Accordingly, because there is no contention here that the Chesapeake Bay project would satisfy the Corps' definition of the term "dike" offered in *Hudson Valley*, it is not clear whether, or to what degree, the decision below actually conflicts with the Second Circuit's holding in *Hudson Valley*.

Moreover, the Fourth Circuit in the instant case recognized (Pet. App. 9a) the government's contention that "the record before the court in *Hudson Valley* was deficient because it did not contain the full legislative and administrative history materials presented * * * in this case." The Fourth Circuit therefore relied upon its own review of the materials that *were* presented in this case, and reached a contrary conclusion.[13] It is entirely possible

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[13]The district court in *Petterson* v. *Resor*, 331 F. Supp. 1302, 1306 (D. Or. 1971), vacated as moot, 494 F. 2d 124 (9th Cir. 1974), in concluding that fills to accommodate an airport expansion were not

that the Second Circuit would follow the approach of the Fourth Circuit in this case if it were presented with the evidence of statutory purpose, legislative intent, and administrative interpretation presented to the Fourth Circuit, particularly if the Second Circuit case were to arise in a different factual setting.[14] If it does not do so in some future case, there will be time enough for this Court to consider the issue. But, for the present, as the Fourth Circuit noted (Pet. App. 9a-11a), the trend in the lower courts since *Hudson Valley* was decided has been

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"dikes," likewise noted that the government had "presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*." See also *Citizens' Committee for Environmental Protection* v. *United States Coast Guard*, 456 F. Supp. 101, 113 (D. N.J. 1978). The only case cited by petitioner that purports to follow *Hudson Valley* is *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-627 (N.D. Cal. 1975), aff'd and rev'd in part on other grounds, 610 F. 2d 581 (9th Cir. 1979), cert. granted on other issues, Nos. 79-1252 and 79-1502 (Oct. 6, 1980). But in that case, the proposed Peripheral Canal would *cross* the middle of the river, completely damming the river without provision for passage. Hence, the court concluded that the structure would be a "dam" or "dike" within the meaning of Section 9. The result in *Sierra Club* v. *Morton* therefore is consistent with our position here.

The Section 9 issue was not raised before the court of appeals in *Sierra Club* v. *Morton* and is not before this Court in Nos. 79-1252 and 79-1502, which raise wholly separate questions of whether there is a private right of action under Section 10 and whether Section 10 applies to diversions for a state water project. Accordingly, contrary to petitioners' suggestion (Pet. 13 n.16), there is no occasion for this Court to grant the petition for a writ of certiorari in this case in order to consider it along with those cases.

[14]We also note that *Hudson Valley* was decided before Congress enacted Section 404(a) of the Clean Water Act in 1972. As we have noted (see pages 13-14, *supra*), the language and legislative history of Section 404(a) indicate that Congress did not intend that congressional approval would be required for the construction of "diked" disposal areas.

consistent with the decision of the Fourth Circuit in this case. Therefore, it is not clear that there is a live conflict in the lower courts, much less a conflict warranting this Court's intervention.

We note in this regard that, as *amicus Sierra Club* points out (Br. 7), an appeal is now pending before the Ninth Circuit in *Sierra Club* v. *Leslie Salt Co.*, No. 80-4095, from a decision by the District Court for the Northern District of California (C-72-561 WTS (Jan. 15, 1980)), which is consistent with the Fourth Circuit's decision in the present case regarding the interpretation of the term "dike" in Section 9. If the Ninth Circuit affirms that judgment, it will reinforce the consistent trend declining to adopt the broad reasoning by the district court in *Hudson Valley*. And if the Ninth Circuit reverses on the Section 9 issue, there would be a more direct and contemporaneous conflict that may warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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ARGUMENT

Petitioners submit this Reply Brief in response to the briefs in opposition filed by the federal respondents, the State of Maryland, the Steamship Trade Association of Baltimore and proposed *amici* Bair Island Investments, Inc. and Redwood Shores, Inc.

While the briefs in opposition make several assertions with which we take issue *infra*, they are most notable for what they do not say. The central contentions in the petition were that (a) a Circuit split had developed, (b) the issue presented was important and likely to recur, and (c) the decision below was fundamentally flawed and erroneous. Only one of those three points — the Circuit split — is squarely disputed by the Solicitor

General, who implicitly concedes that the issue presented herein is significant, and who is unwilling to defend the decision below upon its own terms, seeking instead to modify the holding and recast the reasoning of the court of appeals.[1]

1. The Issue Presented Is Important

The petition pointed out that the issue presented herein is important (Pet. 14-16). It noted, as did the court below (Pet. App. 5a n.5, 17a n.10, 19a), the impetus for increased construction of diked disposal areas, stemming both from the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act Amendments of 1977. This impetus demonstrates that the issue presented herein will recur regularly, and that substantial public funds will be expended on projects which may ultimately be found to be illegal (Pet. 14-16, 21).

The briefs in opposition do not seriously dispute the importance of the question presented. The Solicitor General, who argued that precisely the same issue was substantial enough to warrant this Court's review in *Hudson Valley*[2] (when no Circuit split yet existed), is silent on the subject. The Steamship Trade Association candidly admits the trend toward use of such disposal sites (Steamship Br. 10), while the State of Maryland weakly asserts that the precise number of such projects is "uncertain" and the claimed expenditure of public funds is "speculative" (Md. Br. 12).[3]

Additionally, the presence of two national environmental groups seeking leave to appear as *amici* in support of the peti-

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[1] This Reply Brief is focused principally upon the Solicitor General's brief since most of the contentions made by the other respondents or *amici* are redundant of the Solicitor General's position or involve mere parroting of the Fourth Circuit's opinion.

[2] *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied sub nom. Parker* v. *Citizens Committee for the Hudson Valley*, 400 U.S. 949 (1970) (Harlan, White and Blackmun, JJ., dissenting from denial of *certiorari*) (hereinafter *Hudson Valley*).

[3] Our contention that failure to resolve this issue promptly may result in the waste of public funds is underscored by the recent decision in *Sierra Club* v. *Leslie Salt Co.*, No. C-72-561 (N.D. Cal., Jan. 15, 1980) (reproduced in Md. Appendix). In that case, the

tion, and two corporations seeking to appear as *amici* in opposition, demonstrates that the issues presented herein extend far beyond the factual circumstances presented or the definition of "dike."[4]

2. A True Circuit Split Exists

Aside from the importance of the question presented, there is a clear divergence of views between the Second and Fourth Circuits concerning the scope of Section 9. Although *Hudson Valley* came to the opposite conclusion from that reached by the court below concerning the scope of Section 9, respondents have tendered three arguments as to why there is no "real" circuit split here.

First, they argue that the Second Circuit in *Hudson Valley* did not have before it various legislative and administrative materials which were deemed significant below (Fed. Resp. Br. 15; Md. Br. 8-9; Bair Island Br. 7). This argument is simply incorrect. Despite Maryland's claims about the "wealth" of legislative materials (Md. Br. 8-9), the Solicitor General has forthrightly admitted that "there are virtually no legislative materials directly relating to the 1899 Act itself" (Fed. Resp. Br.

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court refused to follow *Hudson Valley* precisely because such a course would cause a retroactive declaration that several completed projects were illegal (Md. App. 14a-15a). Although relief might well be denied in such circumstances on laches or other equitable grounds, such retroactivity problems provide no basis for misconstruing Section 9 and thereby denying Congress its statutorily-reserved authority to pass upon such projects. The best solution to this dilemma is for this Court to grant *certiorari* in this case, in which construction has not yet begun, resolve the issue definitively, and therby permit the Corps to proceed in a lawful manner in all future cases.

[4] The unusual strategem of an *amicus* brief opposing *certiorari* not only underscores the broad importance of this case, but also indicates those *amici's* doubts as to the correctness of the decision below and their desire to avoid a review of the instant case in this Court.

12 n.9). And with regard to supposedly new contentions based upon "administrative practice," the Corps made essentially the same contention in *Hudson Valley* as it does here:

> "The Act of 1899 does not define a 'dike,' nor is any definition found in the legislative history. However, the Corps of Engineers has, since the passage of the 1899 Act, required applicants to obtain the consent of Congress as to 'dikes' (as we understand the term) prior to obtaining a permit but has issued permits for landfill (and other activities under Section 10) with only the Secretary's approval. . . . [W]e now have 70 years of [administrative] practice whereby the type of permit issued here has been consistently authorized by the Secretary of the Army without such authorization by Congress." Court of Appeals Brief for Federal Appellants in *Hudson Valley,* pp. 25-26.

Contrary to the contention of the Solicitor General that the *Hudson Valley* court noted "the absence of any legislative or judicial authority" (Fed. Resp. Br. 15), the court actually stated that:

> "In the absence of any legislative or judicial authority *to support the defendants' theory of statutory interpretation* we apply the ordinary meaning to the term 'any dike.'" 302 F. Supp. at 1089 (emphasis supplied).[5]

Thus, the court in *Hudson Valley* did nothing substantially different from what the district court did in this case (Pet. App. 42a-46a; on reconsideration, 47a-52a) — it flatly rejected the Corps' convoluted administrative practice arguments in favor of reliance upon the statutory language.

Second, it is argued that *Hudson Valley* is not really contrary to the decision below, because after adopting plaintiff's proposed definition of "dike," the district court added a *dictum* to the effect that the project in question also appeared to meet the Corps' definition of "dike" (Fed. Resp. Br. 16). Aside from the insignificance of such a *dictum* in determining whether there is a conflict between the holdings of the two courts, and aside from the fact that the Second Circuit clearly affirmed the district court's principal holding rather than this off-handed *dictum* (425 F.2d at 106), it should be noted that this alternative defini-

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[5] The only materials absent from the record in *Hudson Valley* were not legislative history, but rather post-enactment hearing materials, the insignificance of which is illustrated below (*see* pp. 8-9, *infra*).

tion of "dike" is also in conflict with the Fourth Circuit's holding herein, since even the Corps' proposed definition of "dike" in *Hudson Valley* did not require the structure to span a waterway. 302 F. Supp. at 1088-89.

Third, respondents argue that there is a "trend" against the views of the Second Circuit among the district courts (Fed. Resp. Br. 18-19; Md. Br. 9-11; Steamship Br. 9, 11-12). Whatever the legal significance of this claimed district court trend, no real trend appears. Although three district courts have espoused the same conclusion reached below (one later vacated on appeal as moot and one with an alternative holding[6]), two district courts have followed *Hudson Valley* — Judge Murray's decision in the instant case, and *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975), *aff'd in part and rev'd in part on other grounds*, 610 F.2d 581 (9th Cir. 1979), *cert. granted on other issues*, Nos. 79-1252 and 79-1502 (Oct. 6, 1980). There is simply no significant trend.

Finally, the Solicitor General suggests a variety of other circumstances in which *certiorari* might be more appropriately granted — upon a reiteration by the Second Circuit of its *Hudson Valley* holding, or upon a reversal of *Leslie Salt* in the Ninth Circuit (Fed. Resp. Br. 18-19). However, these alternatives may well be unavailable, since the Corps is apparently abiding by the *Hudson Valley* decision within the Second Circuit, precluding a case from arising there, and since the retroactivity issue and other unique aspects of *Leslie Salt* may make it a poor vehicle for this Court's review. Given the importance of the question and the existence of a Circuit split, the time is ripe for the Court to resolve the issue.

3. The Decision Below Is Erroneous, As Illustrated By The Solicitor General's Refusal To Defend It Fully

The petition contended that the interpretation of Section 9 adopted by the court below was erroneous, and that its reasoning was fundamentally flawed. In response, the Solicitor

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[6] The *Leslie Salt* case is claimed to reach the same result as the decision below, but that court held, as an alternative to its Section 9 holding, that Congress had consented to the project in question (Md. App. 15a).

General has not defended the general rule adopted by the Fourth Circuit (at the urging of the Corps) — that all dikes within the meaning of Section 9 must completely span a navigable waterway — but has proposed a somewhat different definition of "dike" which includes some structures which do not completely span a body of water (Fed. Resp. Br. 9 n.4, 16 n.11).

Even more importantly, the Solicitor General has backed away from several of the key underpinnings of the decision below. For example, central to the Fourth Circuit's decision was its view that Section 9 was ambiguous, a conclusion supposedly supported by *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929). The petition strenuously attacked this conclusion, and the Solicitor General says nothing about it at all.

Similarly, another crucial element of the Fourth Circuit's decision was its view that Congress was concerned with *dicta* in *United States* v. *Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1890), and *United States* v. *Rider*, 50 F. 406 (S.D. Ohio 1891), when it enacted the 1899 Act, and that this concern caused it to add a Congressional consent provision absent from the 1890 Rivers and Harbors Act. The petition attacked this theory as rank speculation (Pet. 18-19), and pointed out that the 1899 Act did not add a Congressional consent requirement (Pet. 5-6, 18). In response, the Solicitor General concedes the correctness of our position on the supposed change (Fed. Resp. Br. 12-13 n.9), and is completely silent on the allegedly significant *Keokuk* and *Rider* decisions.

Finally, while the court of appeals relied heavily upon administrative practice in upholding the Corps' position, the petition pointed out (as the district court had held, Pet. App. 43a, 48a-49a), that administrative practice was entitled to little or no deference when the agency was interpreting a statute in "bootstrap" fashion so as to expand its own statutory authority (Pet. 19-20). In response, the Solicitor General continues to rely upon administrative practice, but studiously avoids reference to this Court's holdings that such practices are insignificant in these circumstances.[7]

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[7] *S.E.C.* v. *Sloan*, 436 U.S. 103, 118-19 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978); *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

Moreover, the evidence relied upon to support this alleged

The points which respondents do choose to discuss provide little support for the decision below. For example, the Solicitor General attacks petitioners for relying exclusively on labels in defining "dikes" (Fed. Resp. Br. 8), and argues that the proper interpretation of Sections 9 and 10 should turn on the identification of a "reasoned distinction" between those structures which Congress singled out for Congressional review and those entrusted to the Corps (*id.*). However, the court of appeals did not adopt any reasoned distinction, but merely a mechanical rule relating to whether a structure spans a waterway. And no reasoned rule emerges from the federal respondent's current position, save perhaps the rule that a structure is a Section 9 dike when the Corps says that it is.[8]

Respondents urge that Section 9 structures must fundamentally alter a waterway by completely obstructing navigation, or must actually have the potential for such an obstruction (Fed. Resp. Br. 9). We disagree with this approach because it focuses on the effect on navigation of each particular project. Congress has already made a legislative judgment that particular structures (bridges, dams, dikes, and causeways) have a high potential for obstructing navigation, while other structures (wharves, piers, booms, bulkheads, etc.) have a lesser potential for doing so. Congress chose to put all dikes in the former

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long-standing interpretation is exceedingly weak. For example, the Corps' 1977 regulations, adopted after this litigation commenced and in an effort to overturn the *Hudson Valley* precedent by administrative fiat, surely do not demonstrate a long-standing administrative interpretation. The contention that prior regulations defined dikes as structures which spanned waterways (Fed. Resp. Br. 11-12) is simply erroneous. *See, e.g.*, 33 C.F.R. §209.120 (1948). The speeches and affidavits relied upon in this regard are equally unconvincing, as they either lack any specifics concerning Corps practice, or include examples which do not address the question presented herein (*see* Pet. 19-20).

[8] The Corps' *in pari materia* contention (Fed. Resp. Br. 10), which is more properly characterized as *noscitur a sociis*, is totally defeated by its concession that Section 9 applies to some dikes which do not span a body of water. Petitioners also dispute the contention that all causeways or dams completely span a body of water. The *Hudson Valley* causeway, for example, ran along the shoreline. 302 F. Supp. at 1086, 1089.

category, and it is highly inappropriate for the Corps or the judiciary to second-guess that decision with regard to some dikes.[9]

Contrary to respondents' claims (Fed. Resp. Br. 8), petitioners have never claimed that Section 9 should apply to any structure which "may" meet the common definition of "dike," even if it squarely meets the common definition of a bulkhead or some other structure described in Section 10. Our position is that since the structure in question most closely meets the common definition of a dike (rather than the common definition of any structure enumerated in Section 10), it is governed by Section 9, the Section in which Congress placed those structures with a high potential to block navigation. Whether in fact this particular dike will actually obstruct navigation is a question for Congress to consider in the exercise of the powers reserved it by Section 9.

Respondents also continue to rely upon what they call legislative history and administrative practice. However, as noted above, the Solicitor General has admitted that there is virtually no legislative history of the 1899 Act (Fed. Resp. Br. 12 n.9). What respondents really rely upon are snippets of the legislative history of the Clean Water Act of 1972. That Act, however, does not amend Section 9 of the 1899 Act nor approve Corps interpretation of the provision at issue herein.[10] While respondents make much of the Koonce lecture of 1926, it was simply submitted as an exhibit to testimony before a House Committee considering the 1972 Act, which testimony was unrelated to the respective coverage of Sections 9 and 10. It can hardly be said that Congress became aware of, much less acquiesced in, Koonce's statements about the 1899 Act, since the chances are slim that such materials were even seen by the Com-

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[9] The State of Maryland makes the intriguing argument that petitioners have improperly equated the term "dike" with "any dike" (Md. Br. 13). That contention ignores the fact that Section 9 itself employs the term "any . . . dike."

[10] As for materials associated with the 1972 Act, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States* v. *Price*, 361 U.S. 304, 313 (1960).

mittee members. *Guessefeldt* v. *McGrath*, 342 U.S. 308, 317 (1952) (Frankfurter, J.).[11]

In fact, the only real indication of Congress' recent understanding of Section 9's application to structures such as the one at issue favors petitioners' position. In 1970, Congress specifically exempted certain diked disposal sites planned for the Great Lakes from the consent requirement of Section 9. This exemption suggests strongly that such structures were viewed by Congress as within Section 9 unless specifically exempted.[12] And current efforts to obtain Congressional consent for the instant project, S.3170, 96th Cong., 2d Sess. §506 (1980), point to the same conclusion.

In sum, the interpretation of Section 9 below is (a) inconsistent with the plain meaning of the statute and any commonsense interpretation thereof, and (b) unsupportable by any contemporaneous legislative history or long-standing administrative interpretation in which Congress has acquiesced. Thus, not only is the issue presented an important one on which the circuits are divided, but the decision below is erroneous and requires correction lest it continue to stand for principles which even the Solicitor General, who prevailed below, now recognizes to be erroneous.

* * *

On October 6, 1980, this Court granted *certiorari* in Nos. 79-1252 and 79-1502, two petitions arising out of the Peripheral Canal litigation cited above. As stated in the petition (Pet. 13 n.16), petitioners believe that it would be highly desirable to grant *certiorari* herein and set this case in tandem with those cases. Sections 9 and 10 allocate authority over various potential obstructions to navigation among the States, Congress and

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[11] Senator Muskie's quoted remarks (Fed. Resp. Br. 14) about Congressional awareness of Corps practices refer not to the Section 10 permit process, but rather to the Refuse Act Permit Program, which combines responsibilities under the Refuse Act (Section 13 of the Rivers and Harbors Act of 1899) and Section 21(b) of the Federal Water Pollution Control Act.

[12] Respondents' claim that this legislation was a "precautionary clarification" (Fed. Resp. Br. 14 n.10) is unsupported by Congressional materials.

the Corps of Engineers. Since the same legislative background is involved, granting the petition herein will permit this Court to determine in a unified fashion the appropriate demarcations between Congressional, Executive, and State control over projects involving the nation's navigable waterways.

CONCLUSION

For the reasons stated herein and in the petition, this Court should issue a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit.

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and

AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC. AND REDWOOD SHORES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC., AND REDWOOD SHORES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bair Island Investments, Inc., and Redwood Shores, Inc., hereby respectfully move this Court, pursuant to Supreme Court Rule 36.1, for leave to file the attached Brief of Amici Curiae in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The consents of the attorneys for respondents United States Army Corps of Engineers, Clifford L. Alexander, Lt. Gen. John W. Morris, Col. G. K. Withers,

State of Maryland and Steamship Trade Association of Baltimore, Inc., have been obtained. Written consents will be filed with the Court as soon as they are received by counsel. The consent of the attorneys for the petitioners was requested but refused.

The interest of amici Bair Island Investments, Inc. and Redwood Shores, Inc., is set forth in the attached Brief of Amici Curiae. Amici note that the Sierra Club has filed a motion for leave to file an amicus curiae brief in support of the petition for writ of certiorari herein. The Sierra Club and Bair Island Investments, Inc. are opposing parties in an action now pending in the United States Court of Appeals for the Ninth Circuit involving the same issue presented by the decision below.

Respectfully submitted,

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October 13, 1980

No. 80-273

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.,
Petitioners,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC. AND REDWOOD SHORES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICI CURIAE

Bair Island Investments, Inc. is the owner of approximately 3,000 acres of former tidal marshland located near the west shore of the south San Francisco Bay known as Bair Island. Bair Island Investments, Inc. is also the defendant-respondent in an action entitled *Sierra Club, et*

al. v. Leslie Salt Co., et al., No. 80-4095, now pending in the United States Court of Appeals for the Ninth Circuit.[1]

Redwood Shores, Inc. owns similar property of comparable size along San Francisco Bay immediately north of Bair Island. This property is also former tidal marshland that has been reclaimed and developed as a residential community known as Redwood Shores.

Bair Island and Redwood Shores were both patented to the State of California by the United States as swamp and overflowed lands under the Arkansas Swamp Act. Act of September 28, 1850, 9 Stat. 519, now codified at 43 U.S.C. § 982 *et seq.* In total, California received almost two million acres of swamp and overflowed lands from the United States under the Arkansas Swamp Act. See Public Land Commission Committee on Codification, The Public Domain (1884). Most of these lands (including Bair Island and Redwood Shores) were sold by California into private ownership and reclaimed as contemplated by the Arkansas Swamp Act. This reclamation process required the construction of levees (which could also be called "dikes") around the perimeter of the marshes to prevent tidal inundation (in the case of lands bordering tidal waters). The lands have since been developed and now support many of the communities bordering San Francisco Bay.

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[1]Bair Island Investments, Inc., was formerly known as Mobil Oil Estates (Bair Island Investments) Ltd. Mobil Oil Estates (Bair Island Investments) Ltd. acquired the property in question from Leslie Salt Co. in 1975. At the time this litigation commenced in 1972, Leslie Salt Co. was the owner of the property at issue.

Most of California's swamp and overflowed lands, including those bordering tidal waters, were reclaimed before the U.S. Army Corps of Engineers asserted any form of jurisdiction over such lands under the Rivers and Harbors Act of 1899 or any of its predecessor statutes.[2] Recognizing this fact, the Corps of Engineers' own regulations exempt *inter alia* those structures constructed in connection with the reclamation of swamp and overflowed lands from the permit requirement of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, if they were constructed prior to the time that the Corps of Engineers asserted jurisdiction over such lands. 33 C.F.R. § 322.4. To the extent that the reclamation of areas such as Bair Island and Redwood Shores required the leveeing or "diking" of navigable sloughs or other navigable water bodies within the swamp and overflowed lands, Section 10 permits were in fact issued.

The nature of the levees used in reclaiming the swamp and overflowed lands surrounding San Francisco Bay, i.e., whether or not they are "dikes" within the meaning of Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, has been called into question in *Sierra Club, et al. v. Leslie Salt Co., et al., supra.* The decision of the United States District Court in that case adopted virtually the same reasoning as the Fourth Circuit's decision in *Hart and Miller Islands Area Environmental Group, et al. v.*

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[2]The Corp of Engineers' assertion of jurisdiction over former marshlands surrounding San Francisco Bay under the Rivers and Harbors Act of 1899 was the subject of the Ninth Circuit's decision in *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978).

United States Army Corps of Engineers, et al., and applies with equal force to the lands owned by amici Bair Island Investments, Inc. and Redwood Shores, Inc.

ARGUMENT

THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON AN IMPORTANT QUESTION OF LAW WHICH NEEDS TO BE RESOLVED BY THIS COURT

Petitioners' petition for writ of certiorari is based on a supposed conflict between the decision of the Fourth Circuit below and the Second Circuit's opinion in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), *aff'g* 302 F.Supp. 1083 (S.D.N.Y. 1969), *cert. denied sub nom. Parker v. Citizens Committee for the Hudson Valley,* 400 U.S. 949 (1970). They further contend that, as a result of this conflict, the district courts have been confused on the issue presented here. The fact of the matter is, however, that the decisions subsequent to *Hudson Valley* are uniform. Every district court that has considered the question since the Second Circuit's decision has rendered a result consistent with the opinion of the Fourth Circuit.

In order to appreciate the consistency of the lower court decisions in this area, it is necessary to understand something of the merits of this controversy. It is conceded by virtually all parties that the language of Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403, are not models of unambiguous statutory draftsmanship. On their face, the interrelationship between the two sections is ambiguous. In *Wisconsin v. Illinois,* 278 U.S. 367 (1928), this Court was called on to construe these

two sections and to determine whether the diversion of water by the City of Chicago from Lake Michigan required Congressional authorization under Section 9 or approval from the Secretary of War only under Section 10. Observing that the statutory language was ambiguous, this Court relied both on the practical effect of requiring special legislation pursuant to Section 9 and on the Corps of Engineers' long-standing administrative practices and concluded that "[t]his construction of § 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute." *Wisconsin v. Illinois, supra,* at 413.

The controversy here concerns the meaning of the word "dike" in Section 9. In *Citizens Committee for Hudson Valley v. Volpe, supra,* neither the District Court nor the Second Circuit were presented with any evidence of either the legislative history of Sections 9 and 10 or the consistent administrative practices of the U.S. Army Corps of Engineers under those sections. Relying solely on the dictionary definition of the word "dike," the District Court and the Second Circuit concluded that anything which could be called a dike was a dike within the meaning of Section 9.[3] However, this evidence was introduced in subsequent cases, beginning with *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971), *vacated as moot sub nom. Citizens Committee for the Columbia River v. Callaway,* 494 F.2d 124 (9th Cir. 1974). That decision and the subsequent

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[3]The Second Circuit devoted only one paragraph to the consideration of this issue. 425 F.2d at 106. The Court's decision was primarily concerned with questions of standing.

decisions in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F.Supp. 101 (D.N.J. 1978), and in the Fourth Circuit below all concluded, based on a review of the legislative history and the Corps of Engineers' consistent and longstanding administrative practices, that a "dike" within the meaning of Section 9 was a structure which completely spanned a navigable waterway. *Petterson v. Resor, supra,* at 1306; *Citizens Committee for Environmental Protection v. United States Coast Guard, supra,* at 113; *Hart and Miller Islands Area Environmental Group v. United States Army Corps of Engineers, supra,* slip op. at 28-29. The only other decision to touch on this issue, *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Cal. 1975), *aff'd in part, rev'd in part sub nom. Sierra Club v. Andrus,* 610 F.2d 581 (9th Cir. 1979), *petition for cert. pending sub nom. California v. Sierra Club,* No. 79-1252 (filed February 13, 1980), does not, as petitioners contend, create a conflict. In that case, the "dike" in question was a structure which completely spanned a navigable waterway. 400 F.Supp. at 626-627. That structure was clearly a "dike" under either definition of the term.

The particular issue presented here has arisen in only a handful of cases. The project involved in the decision below is itself even more unique. Diked disposal areas such as those involved below are not used for dredge disposal in areas such as San Francisco Bay, where the dredge spoils are dumped offshore. Thus, the petition for certiorari herein not only raises a settled question of law, but also raises it in a relatively unique context.

Petitioners are attempting to create a conflict between the circuits where none in fact exists. Moreover, they are urging the adoption of an impractical and unreasonable construction of the term "dike" which is wholly inconsistent with both the legislative history of the Rivers and Harbors Act and eighty years of consistent administrative practice. The Fourth Circuit's decision below is representative of the conclusion reached by every court which has considered the legislative history of the Rivers and Harbors Act of 1899 and the Corps of Engineers' administrative interpretation of that statute. To the extent that *Citizens Committee for Hudson Valley v. Volpe* holds to the contrary, it has not been followed by the other courts. There is thus no important unsettled question of law requiring resolution by this Court at the present time.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

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October 13, 1980

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Respondents.

Motion for Leave to File *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Motion for Leave to File *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Sierra Club and National Wildlife Federation hereby respectfully move this Court, pursuant to Supreme Court Rule 36.1, for leave to file the attached *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioners Hart and Miller Islands Area Environmental Group, Inc., et al., and Respondents United States Army Corps of Engineers have consented to the filing of this brief, as evidenced by written correspondence with counsel for movants dated September 16 and September 11, 1980, respectively, copies of which are on file with the Clerk of the Court.

Respondents State of Maryland and Steamship Trade Association of Baltimore, Inc., each have under advisement movants' request that they consent to the filing of this brief but as of this date they have neither consented nor refused to consent to such filing. Counsel for the Steamship Trade Association of Baltimore, Inc., however, informed counsel for movants on September 15, 1980 that he did not believe his clients would consent.

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September 17, 1980

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Amicus Curiae Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari of the United States Court of Appeals for the Fourth Circuit

INTEREST OF AMICI CURIAE

Amicus curiae Sierra Club is a non-profit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization having approximately 184,000 members.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

The scope of Sierra Club's concerns encompasses the preservation and wise utilization of the navigable waters of the United States. Members of the Sierra Club regularly use and enjoy these water resources for fishing, boating, camping, photography, study, and other forms of recreational, scientific and spiritual activity.

Sierra Club's interest in this case results from its long standing concern with what it considers to be the proper interpretation and implementation of Sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 401 and 403, by the United States Army Corps of Engineers in environ-

mental protection matters. Sierra Club has manifested this concern, among other ways, by engaging in appropriate litigation intended both to compel the Corps to implement Sections 9 and 10 vigorously, and to defend the Corps when it has done so. See, e.g., *Leslie Salt Co. v. Froehlke (Secretary of the Army) and Sierra Club,* 578 F.2d 742 (9th Cir. 1978) (defense of Corps' assertion of Sections 9 and 10 regulatory jurisdiction in tidal marshlands to the line of mean higher high water [MHHW] on the Pacific Coast).

On occasion the Sierra Club itself has sued as private attorney general to compel compliance with Sections 9 and 10 by private parties when the Corps has failed to do so. See, e.g., *Sierra Club v. Leslie Salt,* 354 F. Supp. 1099 (N.D. Cal. 1972). Sierra Club has been involved continuously in one such case for the last eight years. See *Leslie Salt Co. v. Froehlke and Sierra Club, supra,* at 578 F.2d 744-745, for a summary of this lengthy litigation. As is discussed below, that case is presently pending (for the second time) before the United States Court of Appeals for the Ninth Circuit for resolution of the identical issue presented to this Court in this case.

The National Wildlife Federation is a non-profit membership corporation organized under the laws of the District of Columbia. It is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the navigable waters of the United States. Its principal office is at 1412 16th Street, N.W., Washington, D.C. 20036. The Federation is the nation's largest conservation organization with a combined membership of over three million persons. Members of the Federation regularly use and enjoy the water resources of the nation's coastal and inland navigable

waters for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group the individuals comprise a substantial number of public users of the navigable waters.

The National Wildlife Federation has manifested its interest in dredge and fill disposal and construction activities in the navigable waters in a variety of ways—legal, administrative, and legislative. For example, the National Wildlife Federation has actively litigated the issue of the jurisdictional scope of "navigable waters of the United States" under both Section 10 of the 1899 Rivers and Harbors Act and under Section 404 of the 1977 Clean Water Act, 33 U.S.C. § 1344, and the issue of the substantive reach of the third clause of Section 10 of the 1899 Rivers and Harbors Act. See, e.g., *National Wildlife Federation v. Alexander (II)*, No. 80-1391 (D.C. Cir.) (decision pending) (substantive scope of Section 10); *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975) (jurisdictional scope of Section 404). The National Wildlife Federation has also actively pressed administratively and legislatively to expand the jurisdictional and substantive base of Sections 10 and 404 and to resist efforts to limit federal jurisdiction over activities impacting upon navigable waters of the United States.

The control of diked containment structures in navigable waters, at issue in this litigation, has significant implications for the water resources in which the National Wildlife Federation and its members have a compelling interest.

ARGUMENT: THE FOURTH CIRCUIT DECISION IN THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THE LOWER COURTS ARE SPLIT AND WHICH THIS COURT SHOULD NOW RESOLVE.

Amici curiae Sierra Club and National Wildlife Federation endorse fully the arguments presented by Petitioners at pages 11 through 21 of their Petition for a Writ of Certiorari, "Reasons for Granting the Writ." The issue of what structures within navigable waters of the United States constitute "dikes" within the meaning of Section 9 of the Rivers and Harbors Act, 33 U.S.C. § 401, is an important one on which the lower federal courts are in hopeless disagreement. The practical result of labeling a particular structure a "dike" is that such a structure requires not only permission from the Corps of Engineers, but express Congressional authorization. Structures that do not fall within the category of "dike" (or "bridge", "dam", or "causeway"), do not require the consent of Congress, but may be authorized by the Corps alone pursuant to Section 10 of the Act, 33 U.S.C. § 403.

The Corps has taken the position in this case[1] that an enormously expensive and environmentally disruptive structure in the navigable waters which admittedly is designed to and does in fact control or hold back the waters of the sea or a river, and therefore is a "dike" within the commonly accepted, dictionary meaning of that term, is not, however, a "dike" within the meaning of Section 9 because it does not "completely span" the particular navigable water in which it sits. Thus by means simply of promulgating a regulatory definition that runs counter to the

1. And elsewhere, see 33 C.F.R. § 321.2(e): ("The term 'dike' means an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.")

commonly understood meaning of what constitutes a dike, the Corps arguably has usurped a significant portion of the regulatory authority over navigable waters that Congress intended to reserve to itself in Section 9. Whether this is so should be settled once and for all by this Court: this case presents the opportunity for the court to do so.

Amici curiae agree with Petitioners that a split now exists among the circuits on this question. The Fourth Circuit in this case held that a structure must completely span a navigable waterway in order to be considered a "dike" within the meaning of Section 9 and therefore to require the consent of the Congress; the Second Circuit in *Citizens' Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 106 (2nd Cir. 1970), affirming *Citizens' Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), has held to the contrary.

The law is in a similar state of disarray among the district courts. Within the Ninth Circuit alone three district courts have reached differing conclusions. The court for the District of Oregon held that a Section 9 "dike" must completely span a navigable water and actually obstruct navigation. *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971).[2] The court for the Northern District of California, on the other hand, stated in *dicta* that an obstruction to the navigable waters need not completely span those waters to be a Section 9 "dike", but rather that such a structure need only conform to the ordinary meaning of that term. *Sierra Club v. Morton,* 400 F. Supp. 610, 626 (N.D. Cal. 1975), *aff'd in part, rev'd in part, Sierra Club v. Andrus,*

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2. *Petterson* was vacated as moot by the Ninth Circuit, *sub nom. Citizens' Committee for Columbia River v. Calloway,* 494 F.2d 124 (9th Cir. 1974). Regardless of the merits of its reasoning, *Petterson* therefore carries no authoritative weight. See *United States v. Munsingwear,* 340 U.S. 36, 40 (1950). It nevertheless continues to be cited, most recently by the Fourth Circuit in this case.

610 F.2d 581 (9th Cir. 1979),[3] petition for certiorari pending *sub nom. California v. Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency v. Sierra Club* (No. 79-1502, filed March 17, 1980); and *Sierra Club v. Andrus* (No. 79-1625, filed April 16, 1980). Finally, a different judge in the Northern District of California recently added to the confusion in an unreported decision by regressing to the *Petterson* reasoning and holding that dikes (in that case dikes constructed in tidal marshlands in South San Francisco Bay to control the waters of the Bay in order to create salt evaporation ponds) as commonly understood are not "dikes" for purposes of Section 9 if they do not completely span a navigable waterway. *Sierra Club v. Leslie Salt Co.*, C-72-561 WTS (N.D. Cal. January 15, 1980), appeal to Ninth Circuit pending, *Sierra Club v. Leslie Salt Co.* (9th Cir. No. 80-4095).[4]

One additional district court opinion completes the picture: *Citizens' Committee for Environmental Protection v. U.S. Coast Guard*, 456 F. Supp. 101 (D. N.J. 1978), which, without any independent analysis whatsoever, simply followed *Petterson, supra*, apparently unaware that *Petterson* had been vacated as moot by the Ninth Circuit.

Whether the Corps of Engineers may, without Congressional consent, lawfully authorize construction projects within the navigable waters of the United States that have

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3. The question of what structures constitute Section 9 "dikes" was not raised on appeal and is not discussed in the Ninth Circuit decision.

4. The *Leslie Salt* litigation had its genesis in 1972 and has resulted to date in four officially reported decisions. *Sierra Club v. Leslie Salt*, 354 F. Supp. 1099 (N.D. Cal. 1972); *Leslie Salt Co. v. Froehlke (Secretary of the Army)*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke and Sierra Club*, 578 F.2d 742 (9th Cir. 1978). The issue at bar had not, however, been raised in that litigation prior to the January 15, 1980 district court opinion.

the effect of holding back or controlling in some significant way those waters should not depend upon in what federal judicial Circuit, or what district within a particular Circuit, the project happens to be situated. It is respectfully submitted that an authoritative interpretation of this 80-year-old statute is desirable and long overdue.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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